TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].1921

No. [redacted]114

THE UNITED STATES, PETITIONER,

vs.

M. RICE & CO. AND J. G. NEIDINGER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Petition for certiorari filed July 30, 1926.
Certiorari and return filed October 20, 1926.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 462.

THE UNITED STATES, PETITIONER,

vs.

M. RICE & CO. AND J. G. NEIDINGER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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United States Court of Customs Appeals.

M. RICE & Co., and J. G. NEIDINGER, PETITIONERS,
vs.
THE UNITED STATES, APPELLEE.
No. 2017.

PETITION FOR REVIEW.

To the honorable, the United States Court of Customs Appeals:

Your petitioners, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, respectfully pray that the said United States Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose pray that an order be entered requiring the said Board of Appraisers to return to said United States Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioners also pray for such other or further orders or relief in the premises as the statutes provide or to the court shall seem just.

The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

M. RICE & Co.,
and J. G. NEIDINGER,
Petitioners.
By COMSTOCK & WASHBURN, *Attorneys,*
12 Broadway, New York City, N. Y.

Dated, New York, December 1, 1919.

2 Schedule A.

The following are the importations and entries covered by this proceeding, with the dates thereof, and with such other data as are convenient for purposes of identification:

Entry No.	Vessel.	Entered.	Protest No.	Date of decision.
17261	Ville de Paris	3/31/16	852150/62879	10/4/19
14249	Isle de la Reunion	1/3/16	852149/62402	10/4/19

ASSIGNMENT OF ERRORS.

Schedule B.

The Board of United States General Appraisers has confirmed the action of the collector of the port in assessing and exacting duty at 60 per cent ad valorem on dyed immortelles, thereby making the following errors of law and fact:

(1) In holding the merchandise dutiable as assessed at 60% ad valorem under paragraph 347 of the tariff act of October 3, 1913, as artificial and ornamental flowers.

(2) In not holding the said merchandise dutiable either directly or by similitude at 25% ad valorem under paragraph 210 of said act as cut flowers, preserved or fresh, following the decision of the United States Court of Customs Appeals in Bayersdorfer & Company vs. United States, 7 Ct. Cust. Appls., 66; T. D. 36390.

(3) In holding that the protests were defective or insufficient.

(4) In not holding that the protests were sufficient.

(5) In holding that the similitude clause, to be availed of by an importer, must be specifically invoked in his protest.

(6) In not holding that protests which claim the correct paragraph and rate under which the goods should have been assessed are not fatally defective or insufficient merely because they fail to cite the similitude clause or paragraph number thereof, which applies to all the dutiable sections of the tariff act.

(7) In overruling the protests.

(8) In not sustaining the protests.

(Endorsed:) United States Court of Customs Appeals. Filed December 2, 1919. Arthur B. Shelton, clerk.

STIPULATION AS TO OMITTING IN PRINTING.

United States Court of Customs Appeals.

M. RICE & CO. ET AL., APPELLANTS,
vs. Suit No. 2017.
THE UNITED STATES, APPELLEE.

It is hereby stipulated, subject to the approval of the court, that the record in H. Bayersdorfer & Co. vs. The United States, suit No. 1669, which has been incorporated as a part of the record in the above-entitled suit 2017, need not be printed, there being no dispute in suit 2017 about the facts, and the question involved in said suit 2017 being one of law, namely, as to the sufficiency or insufficiency of the protests.

COMSTOCK & WASHBURN,
Attorneys for Appellants.
SAML. ISENSCHMID,
Special Attorney, for Assistant Attorney General, for the United States.

Dated, New York, December 22, 1919.

Approved:
JAMES F. SMITH,
Judge, Court of Customs Appeals,
Washington, December 31, 1919.

(Endorsed:) United States Court of Customs Appeals. Filed December 31, 1919. Arthur B. Shelton, clerk.

RETURN OF BOARD TO ORDER OF COURT.

Board of United States General Appraisers.

M. RICE & CO. ET AL., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 2017.

The petitioners above named, having applied to the United States Court of Customs Appeals for a review of the question of law
4 and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court having ordered the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

1. Protests 852150/62879 and 852149/62402, with the reports of the collector of customs and the United States appraiser thereon, and correspondence referred to in the collector's letter:

2. Correspondence in protest 852149 referred to in the collector's letter, enclosed herewith in a separate envelope:

3. A transcript of the proceedings before the board:

4. The record in suit 1669, Bayersdorfer vs. United States:

5. The board's decision in question, Abstract 43391, and judgment order.

Exhibits 1 and 2, suit 1669, and entry papers will be forwarded later.

Witness the Honorable Jerry B. Sullivan, president of the board, this 30th day of December, A. D 1919.

[SEAL.]

D. P. DUTCHER,
Chief Clerk.

Immortelles—Similitude—Pleading.

PROTEST 852150/62879.

CUSTOM HOUSE BROKERS,
FORWARDING AND INSURANCE AGENTS,
J. J. BUCHEY & CO.,
421 Chestnut Street, Philadelphia, July 7, 1916.

HON. WILLIAM H. BERRY,
Collector of Customs, Port of Philadelphia:

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties and your decision assessing duty under the tariff act of October 3, 1913, at 60% ad valorem on certain immortelles, covered by entry below named. The classification of said merchandise is not
5 governed by paragraph 347, nor is it dutiable as assessed. It is elsewhere more specifically provided for. It is properly exempt from duty under paragraph 497 as grass fibers or fibrous vegetable substances not dressed or manufactured in any manner, or free of duty under paragraph 452 as moss, seaweeds, or vegetable substances, crude or unmanufactured. If not free from duty as aforesaid, it is properly dutiable at the rate of 25% ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh, or at 15% ad valorem under the last clause of paragraph 210, or at the appropriate rate under paragraph 368 as manufactures wholly or in chief value of chip, grass, palm leaf, straw, weeds or other substances therein named, or at 15% ad valorem under paragraph 385 as an article manufactured in whole or in part and not provided for in the tariff act.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and you and the Government are held liable for the same, and a demand for the repayment thereof, and for a readjustment or liquidation of the entry in accordance with the above claims is hereby made.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions herein.

Entry No.	Vessel.	Entered.	Liquidated ,marks and Nos.
17261	Villa de Paris & Clyde Line.....	Mar. 31, 1916	June 8, 1916, A. R. 33-76.

Respectfully,

M. RICE & CO.,
R. COATS,
Attorney.

$1 fee paid. N. E. P. (Immortelles.)

Hearing requested at New York and 3 days' notice given to J. J. Buchey & Co., 421 Chestnut St., Philadelphia, Pa.

Protest No. 852150/62879, M. Rice & Co.

Please take notice that we have been retained by the protestant as attorneys for the prosecution of this protest, and it is requested that notice of all proceedings thereon be sent to us.

COMSTOCK & WASHBURN,
Attorneys for Protestant,
12 Broadway, New York City.

(Endorsed:) Collector of Customs, Philadelphia. Received July 7, 1916.

6 REPORT OF THE COLLECTOR.

852150/62879.

UNITED STATES CUSTOMS SERVICE,
Port of Philadelphia, June 24, 1918.

To the Board of U. S. General Appraisers,
641 Washington Street, New York, N. Y.:

I submit herewith the protest described below with the accompanying invoice and entry against my assessment of duty at 60 per cent on certain immortelles claimed to be free of duty, paragraph 497; 25 per cent, paragraph 210; and other claims under paragraphs 368 and 385 returned by the appraiser as ornamental leaves and assessed with duty under paragraph 347, act of October 3, 1913. The requirements of paragraph N of Section III, act of October 3, 1913, have been complied with by the protestant, M. Rice Company. Copy of special report of appraiser inclosed, together with copies of correspondence between this office and the department.

Respectfully,

H. K. LATHY,
Special Deputy Collector of Customs.

No.	Name of importer.	Vessel.	Date of entry.
62879	M. Rice & Co.	Ville de Paris	Apr. 3,1916

ANSWER TO PROTEST.

852150/62879

OCTOBER 5, 1916.

In the matter of protest No. 62879, entry No. 17261, immortelles, M. Rice & Company, S. S. Ville de Paris & C. L.

THE COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

SIR: I return herewith papers covered by the above protest with the information that the merchandise in question consisted of
7 immortelles and would now be classified by similitude as preserved cut flowers dutiable at 25 per cent ad valorem under

paragraph 210 of the tariff act of 1913, in accordance with decision of Court of Customs Appeals, T. D. 36390.

Respectfully,

(S) W. W. ROPER,
Appraiser.

Examiner Price.
True copy,
H. M. DAVIS, *Dep. Collector.*

CORRESPONDENCE.

852149/62402 and 852150/62879.

APRIL 17, 1918.

The honorable, the SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: I have the honor to report that J. J. Buchey & Co., customs brokers, this city, filed the following protests against the assessment at 60% on certain immortelles, viz: No. 62233, M. Rice & Co., March 9, 1916; No. 62402, J. G. Neidinger, April 13, 1916; and No. 62879, M. Rice & Co., July 7, 1916.

The question raised in these protests was passed upon by the Court of Customs Appeals in T. D. 36390 wherein it was held that immortelles like the above were dutiable at 25% by similitude under paragraph 210 as preserved cut flowers. In protest No. 62233 the claim was made that said immortelles were properly dutiable at 25% ad valorem under paragraph 210 and in addition the following claim was contained therein:

"The above claims severally and collectively are alternatively made under the paragraphs or sections referred to both directly and by virtue of the 'similitude' and 'component material of chief value' clauses of paragraph 386 of the tariff act of October 3, 1913."

This protest was passed upon by the board favorable to the contention of the importers and difference in duties refunded.

In the subsequent protests (No. 62402 and No. 62879) a similar claim was made that the immortelles in question were dutiable at the rate of 25% under paragraph 210 but did not contain the so-called similitude claim above set forth. These protests were referred to the appraiser and that officer reported that the merchandise consisted of immortelles and would be classified by him by similitude as preserved cut flowers dutiable under paragraph 210 in accordance with the decision of the Customs Court of Appeals No. 36390. In view of this report, but for the failure of the importer to make claim of similitude under the above paragraph this office would have reliquidated the entries in accordance with said protests under paragraph 648 of the Customs Regulations of 1915.

This office was not entirely satisfied of the necessity of pleading the similitude provision of paragraph 386, but in view of the conflict of authority on this point it was decided to forward these

two protests to the board for their decision. Such action was not taken, however, at the request of the importers in order that they might lay before the department their claim of clerical error on the part of their clerk through whose oversight the similitude clause was not included in the two latter protests. This application is inclosed herewith for department's consideration. In it the importers claim that through an error of their stenographer the abovementioned paragraph was omitted from the protests Nos. 62402 and 62879, and they now request that such omission be considered a clerical error and that this office be directed to reliquidate their entries accordingly under said article of the regulations. This office believes that the omission was a clerical one on the part of the importer's employee and is inclined to recommend that relief be granted by the department, particularly as, as above stated, a proper claim was made in the protests as to the actual paragraph under which duties should be assessed and the rate thereof.

Respectfully,

(Signed) WM. H. BERRY,
Collector.

852149/62402 and 852150/62879.

TREASURY DEPARTMENT,
DIVISION OF CUSTOMS,
OFFICE OF THE SECRETARY,
Washington, April 27, 1918.

The COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

SIR: The department is in receipt of your letter of the 17th instant transmitting an application of J. J. Buchey & Co., for the refund of duties on certain immortelles, imported by M. Rice & Co., March 9 and July 7, 1916, and J. G. Neidinger, April 13, 1916.

You report that although protests were duly filed against the assessment of duty at the rate of 60% ad valorem, claiming the merchandise properly dutiable at 25% ad valorem under paragraph 210 as preserved cut flowers, you refused to honor the protests because the importers failed to claim in their protest that the merchandise was dutiable under the said paragraph by virtue of the similitude clause, whereas the United States Court of Customs Appeals in T. D. 36390 held that merchandise similar to that involved in these protests was dutiable under paragraph 210 by virtue of the similitude clause which was pleaded in that case.

The decisions in regard to the question whether the similitude clause must be claimed in the protests are conflicting. The board in T. D. 22161, G. A. 4699, sustained the importers' protests as to the classification of the merchandise covered thereby where the similitude clause was invoked, but denied the protest as to one protest where the importers failed to invoke the said clause. The United

States Circuit Court of Appeals for the second circuit (78 Fed. Rep., 620) held that when an importer intends to rely upon the similitude clause he must state that fact in his protest and that a protest claiming articles dutiable under a provision imposing a duty on precious stones is insufficient to raise the question whether such stones should have been so classified by force of the similitude provision.

The United States Circuit Court of Appeals for the third circuit, however (112 Fed. Rep., 517), sustained a protest that certain merchandise was dutiable under paragraph 165 of the tariff act of 1894 by virtue of the similitude clause, although the importer had not claimed the merchandise so dutiable by similitude.

It appears that the Government applied for writ of certiorari in this case and that the Attorney General in his application used this language: "The importers' protest specified paragraph 165 only and did not rely on the similitude clause, nor did their argument below appeal to the similitude principle but was wholly taken up with an attempt to show that base bullion is lead ore or lead dross rather than lead in pigs, etc."

The Supreme Court denied the writ and the Board of United States General Appraisers in T. D. 23852 sustained a protest of the importers covering like merchandise, although the importers had not invoked the similitude clause, the board construing the denial of the application for the writ of certiorari as being an approval of the United States Circuit Court of Appeals decision in sustaining the protests notwithstanding the failure to invoke the similitude clause.

The United States Circuit Court (135 Fed. Rep., 215) in a decision involving the question whether the similitude clause must be invoked following the Guggenheim case (112 Fed. Rep., 517), but on an appeal by the Government the United States Circuit
10 Court of Appeals for the second circuit after citing the decisions above referred to reversed the Circuit Court without opinion. This appears to be the last decision construing the provision of law under consideration, and as it holds that the similitude clause must be invoked, the department must decline to authorize a reliquidation of the entries covering the immortelles, the subject of the protests referred to in your letter, where the protests have not claimed the merchandise properly dutiable under paragraph 210 by virtue of the similitude clause, and you are accordingly directed to forward the protests (62402 and 62879) to the board for review.

Respectfully,

(Signed) F. M. HALSTEAD,
Chief, Division of Customs.

No enclosures.

PROTEST 852149/62402.

CUSTOM HOUSE BROKERS.
FORWARDING AND INSURANCE AGENCY,
J. J. BUCHEY & CO.,
421 Chestnut Street, Philadelphia, April 13, 1916.

HON. WILLIAM H. BERRY,
Collector of Customs, port of Philadelphia.

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties and your decision assessing duty under the tariff act of October 3, 1913, at 60% ad valorem on certain immortelles covered by entry below named. The classification of said merchandise is not governed by paragraph 347, nor is it dutiable as assessed. It is elsewhere more specifically provided for. It is properly exempt from duty under paragraph 497 as grass fibers or fibrous vegetable substances not dressed or manufactured in any manner or free of duty under paragraph 552 as moss, seaweeds, or vegetable substances, crude or unmanufactured. If not free from duty as aforesaid, it is properly dutiable at the rate of 25% ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh, or at 15% ad valorem under the last clause of paragraph 211, or at the appropriate rate under paragraph 368 as manufactures wholly or in chief value of chip, grass, palm leaf, straw, weeds, or other substances therein named, or at 15% ad valorem under paragraph 385 as an article manufactured in whole or in part and not provided for in the tariff act.

It is further and alternatively claimed that said merchandise is entitled to a discount of five per centum on duties by virtue of subsection 7, of paragraph J, of section 4, of said act or by virtue of said subsection 7 and the proviso thereof taken in conjunction with the provisions of the treaty or treaties concluded between the United States and the nation or country in whose vessel said merchandise was imported or the nation or country of exportation.

The excess is paid under compulsion, to obtain and retain possession of said merchandise or articles, and you and the Government are held liable for the same, and a demand for the repayment thereof, and for a readjustment or liquidation of the entry in accordance with the above claims, is hereby made.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them of the facts involved and in support of the contentions herein.

Entry No.	Vessel.	Entered.	Liquidated.	Marks & Nos.
14249	Ile de la Reunion and Clyde Line.....	1/3/16	3/15/16	J. G. N. 500-539.

Respectfully,

J. G. NEIDINGER,
ROWLAND COATS, *Attorney.*

Hearing requested at New York and 3 days' notice given to J. J. Buchey & Co., Philadelphia, Pa.

Protest No. 852149/62402, J. G. Neidinger.

Please take notice that we have been retained by the protestant as attorneys for the prosecution of this protest, and it is requested that notice of all proceedings thereon be sent to us.

COMSTOCK & WASHBURN,
Attorneys for Protestant,
12 Broadway, New York City.

(Immortelles.)
$1, Fee paid.
N. F. P.
TO BOARD OF U. S. GENERAL APPRAISERS,
New York, N. Y.

(Endorsed:) Collector of customs, Philadelphia. Received April 16, 1916.

12 REPORT OF THE COLLECTOR.

852149/62402.

UNITED STATES CUSTOMS SERVICE,
Port of Philadelphia, June 24, 1918.

To the Board of U. S. General Appraisers,
641 Washington Street, New York, N. Y.

I submit herewith the protest described below with the accompanying invoice and entry, against my assessment of duty at 60 per cent on certain immortelles claimed to be free of duty, paragraph 497; 25 per cent, paragraph 219, and other claims under paragraphs 368 and 385 returned by the appraiser as ornamental leaves and assessed with duty under paragraph 347, act of October 3, 1913. The requirements of paragraph N of Section III, act of October 3, 1913, have been complied with by the protestant J. G. Neidinger. Copy of special report of appraiser enclosed, together with copies of correspondence between this office and the department.

Respectfully,

H. K. LATHEY,
Special Deputy Collector of Customs.

No.	Name of importer.	Vessel.	Date of entry.
62402	J. D. Neidinger.....	Ile de la Reunion.....	Jan. 13, 1918

ANSWER TO PROTEST.

852149/62402

JUNE 5, 1916.

In the matter of protest No. 62402, entry No. 14249, J. G. Neidinger, immortelles, S. S. Ile de la Reunion.

THE COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

SIR: I return herewith papers covered by the above protest with the information that the merchandise in question consisted of natural and dyed immortelles which in view of T. D. 36390,
13 would now be classified and returned as dutiable at 25 per cent ad valorem under paragraph 210 of the tariff act of 1913, for which reason the said protest should be sustained.

Respectfully,

(S) J. K. FORNACE,
Ass't Appraiser.

Examiner Price.
True copy.
H. M. DAVIS, *Dep. Collector.*

PROCEEDINGS BEFORE THE BOARD.

Board of U. S. General Appraisers.

In the matter of protest No. 852150, of M. Rice & Company, and protest No. 852149, of J. G. Neidinger.

Before General Appraiser Howell.

PHILADELPHIA, PA., *May 22, 1919.*

Appearances:
COMSTOCK & WASHBURN (by J. STUART TOMPKINS, Esq.),
Of Counsel for the Protestants.
SAMUEL ISENSCHMID, Esq.,
Special Attorney for the United States.

MR. TOMPKINS. I think we can dispose of these by stipulation in open court. It is hereby stipulated and agreed by and between the attorney for the importers and the Assistant Attorney General for the United States that the merchandise covered by the protests above named is of the same character as that which was the subject of decision by the Customs Court of Appeals in the case of Bayersdorfer vs. United States, T. D. 36390, and that the record under said decision in T. D. 36390 may be and hereby is incorporated as a part of the record in these cases. It is further agreed that all of the papers in the protest jackets may be received in evidence as a part of the record in these cases, and the said protests are submitted for decision on this stipulation and record as thus made up.

Mr. ISENSCHMID. That is correct, but, in addition to that, the
14 Government moves for the overruling of both protests because the similitude clause is not pleaded in the protests. The decision cited by my friend held the merchandise covered by these two protests to be dutiable at 25 per cent under paragraph 210 by similitude. The similitude clause is not invoked in either protest, and therefore we submit the protests should be overruled on the point of similitude. I would like to have the stenographer note T. D. 22161, G. A. 4699, in which the board held that similitude must be pleaded in order to be available.

Mr. TOMPKINS. Well, if your honor please, I should be glad if the record might be held open, as there are several decisions I should like to cite in reply, particularly referring to a decision by the Customs Court of Appeals—I believe it is in the case of Snellenberg vs. United States—and, as I understand, the question now open in these cases is a question of law, whether it is necessary and essential to plead the similitude clause in any case.

General Appraiser HOWELL. Suppose we allow you ten days for a memorandum.

Mr. TOMPKINS. That will be satisfactory.

Mr. ISENSCHMID. And five days for the Government to reply after that time?

General Appraiser HOWELL. Yes. Cases submitted, ten days for the importer to file a memorandum and five days thereafter for the Government to reply.

DECISION OF THE BOARD.

UNITED STATES GENERAL APPRAISERS, NEW YORK.

October 4, 1919.

In the matter of protests 852149/62402 and 852150/62879 of J. G. Neidinger and M. Rice & Company against assessment of duty by the collector of customs at the port of Philadelphia.

Before Board One.

McCLELLAND, SULLIVAN, BROWN, General Appraisers.

McCLELLAND, General Appraiser: The merchandise consists of immortelles upon which duty was assessed at the rate of 60 per cent ad valorem under paragraph 347 of the tariff act of 1913. Protestants
15 claim that the merchandise is entitled to free entry under paragraphs 452 and 497, or that duty should have been assessed at 25 per cent under paragraph 210, or at one of the rates provided in paragraphs 368 and 385 of said act.

The record shows that the merchandise is of the same character as that which was the subject of Bayersdorfer vs. United States (7 Ct. Cust. Appls., 66; T. D. 36390), the record in that case being incorporated and made a part of the evidence in these cases.

The Bayersdorfer case, supra, held that such merchandise was dutiable by similitude under paragraph 210, at 25 per cent, but neither of these protests mentions paragraph 386. It is urged by counsel for the Government that the protests are insufficient inasmuch as they do not invoke the similitude clause and should therefore be overruled.

As we said in G. A. 7849 (T. D. 36117):

"It has been repeatedly held that the primary function of a protest is to not only direct the collector's attention to the fact that it is claimed that he had made an error in classification, but in addition, to present to the collector in such form as would lead him, if he was satisfied that an error had been made, to make the proper classification."

It has also been held that the burden rests upon the importer not only to show that the classification complained of was erroneous, but that the classification claimed in his protest is correct.

(Benjamin Iron & Steel Co. vs. United States, 2 Ct. Cust. Appls., 159; T. D. 36177, and cases therein cited.)

In Herrmann vs. Robertson (152 U. S. 526), Mr. Chief Justice Fuller, writing the opinion, it was held that a protest was defective for the reason that—

"It failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable."

In the case at bar a variety of alternative claims were made for free entry and for rates of duty lower than that assessed, but among these claims paragraph 386, which contains the similitude clause of the existing tariff law, was not invoked or mentioned. It is our view, therefore, that inasmuch as the protest failed to specifically direct the collector's attention to the applicability of the similitude clause to the merchandise there was no reason why he should have reviewed his decision with a view to determining whether it applied. The requirements of paragraph N as to what a protest against the liquidation of duties shall contain would be absolutely meaningless if the collector was required to examine paragraphs of the tariff act as to their application to merchandise without regard to whether protestants made claim thereunder.

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In Hahn vs. Erhardt (78 Fed., 622), passing upon the sufficiency of a protest where the importer sought relief under the similitude clause without making claim thereunder, Judge Wallace in the Circuit Court of Appeals for the second circuit, writing for the court, said:

"We conclude that in all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff schedule, and means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision,

he should state the fact in his protest, and, if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute."

See also G. A. 4699 (T. D. 22161); G. A. 6327 (T. D. 27252); and G. A. 8062 (T. D. 37177).

The Board in Abstract decision 775 (T. D. 25134) held that an importer in his protest having claimed under a particular paragraph under which he would be entitled to relief by the application of the similitude clause it was not necessary to invoke the similitude clause in his protest to entitle him to relief. That decision was appealed to the United States Circuit Court and there Judge Hazel sustained the ruling of the board (United States vs. Dearberg, 135 Fed., 245; T. D. 25782); but in United States vs. Dearberg (143 Fed., 472; T. D. 27008), Judge Hazel was reversed by the United States Circuit Court of Appeals.

We do not think that the views expressed by Judge Montgomery in United States vs. Snellenberg (9 Ct. Cust. Appls., —; T. D. 37939), are in any way counter to those expressed in the cases above cited. In the Snellenberg case, so far as the sufficiency of protest was in issue, the sole question was whether the importers were entitled to reclassification and refund of duties on their claim that duty should have been levied under paragraph 294, without invoking paragraph 303. There was there no controversy about the character of the merchandise. As the court says: "Both the collector and the importers treated these goods as carpet. * * * The collector is presumed to know the law." As paragraph 303 was merely directory as to the classification of the merchandise under paragraph 294 there was no occasion for pleading it.

In this case the situation is very different. The merchandise is nowhere directly provided for in the tariff schedules, and therefore the collector could not be expected to consider whether it might be similar "either in material, quality, texture, or the use to which it might be applied, to any article enumerated" in the
17 tariff law unless his attention was specifically directed to the fact that the importers so claimed.

The one outstanding decision of the Board in which it was held to be unnecessary for an importer to claim under the similitude clause is G. A. 5171 (T. D. 23852), but much as we respect the opinion of our late Judge Somerville, we agree with Judge Hay, as stated by him in G. A. 8062, supra, that the weight of authority is clearly in favor of the view that the similitude clause to be availed of by an importer must be specifically invoked in his protest.

The protests are overruled without affirming the decision of the collector.

CHAS. P. MCCLELLAND,
J. B. SULLIVAN,
Board of U. S. General Appraisers.

DISSENTING OPINION.

BROWN, General Appraiser: I am unable to concur in the view that when a protestant has claimed the correct paragraph under which his goods should have been assessed (here paragraph 210) and has fully proved his case, that the Congress intended he should, nevertheless, be defaulted upon the technical and artificial ground that he should also have cited the paragraph number of the similitude clause which applies to all the dutiable sections of the act.

When he claims the correct paragraph, that is and ought to be sufficient whether his proof shows that his goods come thereunder by the common meaning of the words of the statute, by their commercial meaning, by chief value, by similitude, or any other rule of fact or law which will so classify them.

The rule set out by the majority opinion works a manifest injustice which there is no language to justify in the statute governing this liberal procedure. It, on the contrary, was established to give an easy judicial remedy for the return of money illegally taken and to prevent injustice in the collection of customs taxes.

So believing, I emphatically dissent.

This was the view expressed by Judge Somerville in Balbach's case, G. A. 5171 (5 Treas. Dec., 557), by Judge Gray, of Delaware, in the Guggenheim case (112 Fed., 517), and by Judge DeVries in the last Dearberg case, decided March 29, 1906, G. A. 6327 (11 Treas. Dec., 493).

The case of Herrman vs. Robertson (152 U. S., 521) has no application. There the protest read:

"We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per cent ad val. as a non-
18 enumerated article under the second half of section 2499, Rev. Stat., being the highest rate of duty which any of the component material pays."

The schedule under which the goods were held to be properly dutiable (Schedule M, section 2504, R. S.) as "all other manufactures of hair, not otherwise provided" was not mentioned in the protest which was consequently held to be insufficient.

The Court of Customs Appeals has never passed upon this exact issue, although a liberal construction was given to the protest in the case of United States vs. Snellenburg (36 Treas. Dec., 202; G. A. 8190, 35 Treas. Dec., 42). There a reference to paragraph 294, act of 1913, was held to necessarily include paragraph 303, not mentioned in the protest.

Again, in the protest construed in the case of Michelin Tire Co. vs. United States (6 Ct. Cust. Appls., 283; G. A. 7603, 27 Treas. Dec., 251), a reference to the basic rate of paragraph 451, act of 1909, was held to necessarily include a different rate therein.

If the principle controlling those two cases is to be applied here, this protest is sufficient to raise the issue involved. To sufficiently

state an issue means to definitely state it, even if further microscopic exactness might make the statement seem more detailed but not indeed more definite or more sufficiently or completely stated. Such unnecessary detail is mere surplusage.

We are dealing here solely with judicial procedure and a necessary judicial remedy although it is accidentally and perhaps confusedly embodied in a so-called customs administrative act.

Judge Montgomery in United States vs. McCoy (5 Ct. Cust. Appls., 264, 268) has aptly described the protest which initiates a customs case as—

"* * * the institution of a proceeding to test the validity of the action of the collector and partook of the nature of a pleading, and was so treated and construed. * * *"

The tendency of all modern judicial decisions, Federal and State, has been to liberally construe statutes relating to "pleading and practice" so as to avoid, if possible, all technical miscarriage of justice.

Paragraph 386, act of 1913, the so-called similitude clause, mentions no rate of duty, specific or ad valorem, but lays down three rules of construction governing nonenumerated articles, and taking them out of paragraph 385 determines under what other dutiable schedules they shall fall. It also contains a fourth rule of construction relating to all dutiable articles whether enumerated or not.

Said paragraph reads as follows:

"386. That each and every imported article, not enumerated in this section, which is similar, either in material, quality, tex-
19 ture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which it levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words 'component material of chief value,' wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two ore more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates."

In Cohen vs. Phelps (6 Fed. Cas., 17; 2 Sawy., 530; Case No. 2964), Sawyer, Circuit Judge, said:

"In other words, section 20 is to be regarded as furnishing a definition of terms, or rather a rule for construction designed to cover un-

known or overlooked articles, by which they are classed with those specifically and individually named to which they bear the greatest similitude.

* * * * * * *

"It affords a rule of construction for terms applied to specific articles, and substantially says that a nonenumerated article, that is to say, an article not designated by its specific name, shall be classed under the name of that article specifically named to which it bears most resemblance in material, quality, texture, or the use to which it is applied."

This decision was under the tariff act of 1864.

In Morlot vs. Lawrence (1 Blatch., 608; 17 Fed. Cas., 770; Case No. 9815), a decision under the act of 1846, Mr. Justice Nelson, in speaking of the similitude clause, said:

"That clause enacts simply a principle or rule of construction, which, when applied to a dutiable article, determines within what class it should be rated. In other words, speaking with reference to the act of 1846, it determines under what schedule the article should be ranged for the purpose of charging the duty."

20 In Stuart vs. Maxwell (16 How., 150) Mr. Justice Curtis held that the similitude clause of the tariff act of 1842 was not repealed by the general repealing clause in the tariff act of 1846 because it was a general rule of construction and not a dutiable schedule, stating (page 160):

"In the first place, then, it must be observed, that the 20th section of the act of 1842 does not impose any particular rate of duty upon imports. It was designed to afford rule to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same rules, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by legislation to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted."

And again on the same page:

"This section would then only have afforded a rule by which it could be determined that certain articles did substantially belong to and were to be reckoned as coming under a particular schedule."

And on page 162:

"Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it

is to be deemed the same, and to be charged accordingly; that the act of 1846 has provided for it under the name of what it resembles."

In fact the court treats it as if it were an administrative provision to enforce the collection of the revenues and therefore carried forward with the other administrative provisions into the new act, saying in this connection:

"The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were
21 acted on; and among these existing laws is that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked; when this has been determined, the act of 1846 levies the duty. (Italics mine.)

This view of the character, scope, and effect of the similitude clause stated by the Supreme Court in 1853 has consistently been followed by all the courts in applying the same under all subsequent tariff acts.

In Aloe vs. Churchill (44 Fed., 50, 51) it was said:

"It does not impose duties upon specific articles, but enunciates a rule by which duties may be assessed when articles for any reason can not be fairly assessed under any provision of the schedules."

In Fisk vs. Arthur (103 U. S., 431) Chief Justice Waite quotes Mr. Justice Curtis' language with approval.

See also Mason vs. Robertson (139 U. S., 624). Arthur vs. Fox (108 U. S., 125), requoting the language of Stuart vs. Maxwell and Liebenroth vs. Robertson (144 U. S., 35).

As late at 1910 the Circuit Court, Northern District of Illinois, in Wakem & McLaughlin vs. United States (180 Fed., 1021) adopted the opinion of General Appraiser McClelland, wherein the object of the similitude clause is defined by quotation from Stuart vs. Maxwell.

It never has been seriously contended that the other rules of construction contained in all the similitude clauses, referring to chief value or mixed materials or to the highest applicable rate, must be specially pleaded in a protest. On December 24, 1909, in White's case, G. A. 6959 (18 Treas. Dec., 440), it was held that it was not necessary to cite the mixed-materials clause of paragraph 481 of the act of 1909, which paragraph also contained the similitude clause. Similarly no citation of the similitude rule in paragraph 386 or of any other rule of construction relied on, whether stated in the statute itself or matter of general law, need be specially pleaded in order to make a protest sufficient.

The rule of law can not be that the protestant, relying upon a rule of construction relating to similitude, must so state in his protest, when if he counts upon the other rules of construction embodied in the same paragraph, the mixed material, the chief value, or the higher rate provision he admittedly does not have to say so.

The distinction becomes too fine to be substantial. The mere statement of such distinction sufficiently demonstrates its unsoundness.

Logically if any rule of construction must be specially pleaded all must be, for if it is difficult for the collector to understand a similitude claim without special reference it is equally difficult
22 for him to know, for instance, that commercial definition was intended.

And if every rule of construction must be specially pleaded in addition to naming the correct paragraph for the classification of the goods, the technical niceties and difficulties of invoking this remedy are enormously increased and many just claims brought in outlying ports by merchants themselves (without legal advice and without printed forms making blanket claim for everything, including similitude) must fail of recovery.

The very fact that, unlike all other modern pleadings, customs protests can not be amended should lend every legal intendment in favor of a liberal construction for every protest which claims the right paragraph upon whatever theory of law or fact the goods are properely classified thereunder.

This remedy is a national one and was intended as much for the protection of the casual importer in the small port remote from ordinary business activity as for the well-advised large merchant in the great market places.

The national scope of this procedure and its general purposes must be taken into account whenever a congressional intent is contended for which increases in any way the technical requirements for bringing this form of action against the Government of the United States.

If a liberal construction must be given to the pleadings in actions between individuals in applying the remedies of the "private law," such liberal construction is even more imperatively required in legal actions by the citizens against their Government now known as the "administrative" or "public law."

The authorities are uniform to the effect that the proceedings by protest under the customs administrative act is a suit against the United States.

In Field vs. Clark (143 U. S., 649), affirming G. A. 203 (T. D. 10553), the report of the case says (page 650):

"These were suits by importers to obtain a refund of duties claimed to have been illegally exacted on imported merchandise."

In United States vs. Eckstein (222 U. S., 130, December 4, 1911), the expression "This suit" is used by Chief Justice White.

In Marine vs. Lyon (62 Fed., 153) it is said:

"The action in the main case was brought under the act of 1890. That act is the only authority for such a suit."

In Chase's case (50 Fed., 695) it is said:

"Under the act of June 10, 1890, no interest or costs can be recovered against the United States, because the suit is in substance brought against the United States."

23 See also United States vs. Davis (54 Fed., 147).

The appeal statute (sec. 198 of the Judicial Code), and the Court of Appeals in 7 Cust. Appls., 243, refer to the board's decision as a "judgment," a term only applicable to lawsuits.

Judge Barber in United States vs. Schwartz (3 Cust. Appls., 24), says:

"The importers here are seeking to wage a suit against the United States."

Can it be that after all other jurisdictions have discarded such narrow rules of pleading they still obtain here? The writer does not believe the Congress so intended. Such construction, it seems to him, tends to discredit the underlying congressional purpose in providing this remedy and tends to minimize the importance of the whole system established for the litigation of customs claims.

Note in conclusion that paragraph 386, previously quoted herein in full, does not separate the four rules of construction contained therein into separate paragraphs with distinct numbers, or even into separate sentences, but they are all contained in one sentence. To say, then, that the portion of the sentence in front of the semicolon must be specially pleaded and the portion following the semicolon need not be, certainly involves the rules of customs pleading, as some one said of the rules of the ancient common law, in "metaphysical mazes of hopeless intricacy."

GEO. STEWART BROWN,
U. S. General Appraiser.

JUDGMENT ORDER.

At a term of Board One of United States General Appraisers, held in the city of New York on the 4th day of October, 1919.

Present: McClelland, Sullivan, Brown, General Appraisers.

J. G. NEIDINGER ET AL.,
vs.
THE UNITED STATES. } Protest No. 852149/50.

The above entitled cause having regularly come on to be heard and the Board, in its decision dated the 4th day of October,
24 1919, having determined the law and facts in favor of the Government; it is hereby ordered, adjudged, and decreed this 4th day of October, 1919, that the protests in this case be and the same are hereby overruled.

CHAS. P. McCLELLAND,
Chairman, Board One.

[SEAL.]

By D. P. DUTCHER,
Chief Clerk.

25 EXTRACT FROM CLERK'S MINUTES.

United States Court of Customs Appeals.

Friday, March 26, 1920.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 26th day of March, A. D. 1920.

Present: The Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

* * * * * * *

M. RICE & CO. AND J. G. NEIDINGER, APPELLANTS, v. THE UNITED STATES, APPELLEE. } No. 2017.

Said appeal came on to be heard before the court, and after hearing the arguments of counsel the case was taken under advisement by the court.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY, *Presiding Judge.*

CERTIFICATE OF IMPORTANCE.

United States Court of Customs Appeals.

M. RICE & CO. AND J. G. NEIDINGER, APPELLANTS, v. THE UNITED STATES, APPELLEE. } No. 2017.

To the honorable the judges of said court:

In accordance with the provisions of the act of Congress establishing the Court of Customs Appeals, I hereby certify that in my opinion the case above stated is of such importance as to ren-
26 der expedient its review by the Supreme Court of the United States in the manner provided by said act.

This seventh day of April, 1920.

(Signed) ALEX. C. KING, *Acting Attorney General.*

Filed, United States Court of Customs Appeals, April 7, 1920.

ARTHUR B. SHELTON, *Clerk.*

COURT'S OPINION.

United States Court of Customs Appeals.

February term, 1920.

M. RICE & CO. AND J. G. NEIDINGER, APPELLANTS, v. THE UNITED STATES, APPELLEE. | Suit No. 2017. Cal. No. 16.

MARTIN, Judge, delivered the opinion of the court.

The merchandise in this case consists of certain dried and dyed immortelles. They were assessed with duty at the rate of 60 per cent ad valorem as artificial and ornamental flowers, under paragraph 347 of the tariff act of 1913.

The importers protested against the assessment, claiming the merchandise to be dutiable at the rate of 25 per cent ad valorem, "under the first clause of paragraph 210, as palms or cut flowers, preserved or fresh." The protests, it should be noted, contained no specific reference to the similitude provisions of the act as a basis for this claim.

It is now conceded that the merchandise was erroneously assessed, and that it was dutiable at the rate of 25 per cent ad valorem by similitude with "cut flowers, preserved or fresh," as enumerated in the first clause of paragraph 210, being the clause cited in the protest. (Bayersdorfer & Co. *v.* United States, 7 Ct. Cust. Appls., 66; T. D. 36390.) The sole question in the present case, therefore, is whether the importers' failure to specify in the protests that they were claiming assessment under the first clause of paragraph 210 aforesaid by similitude under paragraph 386 of the act as well as by direct enumeration forbids a decision sustaining the protests under that clause by similitude. In other words, is it necessary that protestants shall specifically plead the similitude provisions in their protest in order to secure relief thereunder?

27 This question was submitted to the Board of General Appraisers, and in a majority decision the board answered it in the affirmative. The protests accordingly were held to be insufficient as a basis for relief by similitude, and were overruled. The importers now appeal.

It must be conceded that each side of the present controversy admits of very persuasive arguments in its behalf, and doubtless because of this fact the decisions of the board and the courts upon the question have been far from uniform. Upon a consideration, however, of the arguments advanced and the authorities cited in the case, we hold that the protests in question, notwithstanding their failure to refer specifically to the similitude provisions or paragraph, were sufficient as a demand for the assessment of the merchandise under paragraph 210 as "cut flowers, preserved or fresh," as well by similitude as by direct enumeration thereunder.

and that they should have been sustained. That is to say, it was not absolutely necessary to make express claim of the similitude provisions in the protests.

This conclusion is justified in the first place by the general principles which have been recognized by the board and the courts when dealing with the subject of protests. The paragraphs of the present tariff act, as well as former ones, which relate to the filing of protests, are so familiar that it is unnecessary to copy them here, or even to refer to them by letter or number. They provide that a protest shall set forth distinctly and specifically the reasons for the protestant's objection to the decision of the collector as to the rate and amount of duties chargeable upon the imported merchandise. It must be filed within a limited time after liquidation or after payment of the duties upon an importation; no form is prescribed for it in the act.

It is manifest that in the ordinary course of trade such instruments are often likely to be filed by laymen without technical education in the law, and under circumstances which make it difficult, if not impossible, to secure the aid of counsel. It is reasonable to assume that this fact was within legislative view, and therefore to conclude that a protest should be tested by the rules relating to commercial instruments rather than by the strict rules of legal pleadings. It may be noted also in this behalf that no provision in practice is made for a demurrer or motion addressed to the form or sufficiency of a protest, nor for an answer or plea thereto, nor for an amendment thereof. Consequently, when the act requires that a protestant shall set forth in his protest "distinctly and specifically the reasons for his objections" to an assessment, it requires only such a measure of distinctness and particularity as is fairly and reasonably necessary to inform the collector concerning the nature and extent of the
28 protestant's claim. And in applying this rule it should be remembered that the collector is charged with a knowledge of the law, in the present instance with a knowledge of the similitude provisions and their coordination with each of the enumerating paragraphs of the act. When the collector and his advisory assistants first pass upon an importation they must necessarily consider the similitude provisions as well as the enumerating paragraphs of the act in order to classify the merchandise for duty. Conversely, the importers also are legally charged with a knowledge of the similitude provisions of the act, and accordingly the collector is under no duty to mention these when they form the basis in part of the assessment.

This is an important rule in practice in behalf of the Government, and so far as we are informed it has never been questioned. That is to say, it happens not infrequently that merchandise is assessed with duty by the collector as answering directly to a specific duty-levying enumeration of the act. In such a case of course no mention is made of the similitude provisions in the assessment. However, it may be found upon protest that the merchandise thus assessed does not answer directly to the specific enumeration in question, but that it

is nevertheless dutiable thereunder by force of the similitude provisions. Such an assessment certainly should not fail because the collector omitted reference to these provisions in the assessment, and neither should an importer's objection to an assessment fail because of a similar brevity in drafting the protest. It is true, strictly speaking, that the similitude paragraph is itself in a sense an assessing paragraph, but it may fairly be said that in the general language and common understanding of those dealing with the subject, and indeed in the language of many court decisions as well, merchandise which becomes dutiable at a given rate by similitude with enumerated articles is regarded as being brought thereby within the enumerating paragraph for assessment, and it is no stretch of construction to require that the language of a protest should be interpreted with this common form of expression in view.

When it is borne in mind that the similitude clause is in effect a part of and must be read in conjunction with every duty-levying provision of the act and that as such its single enactment makes for economy and simplicity of expression so known to all, and that it levies no other rate or rates of duty than that expressed in the particular provisions of which it is in effect a constituent part, in this respect it differs not at all in principle from the one general levy of the rate or rates of duties prescribed in each paragraph of the act by the defining and limiting language of the enacting clause of the act, to wit:

"That on and after the day following the passage of this act, except as otherwise specially provided for in this act, there
29 shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed, namely" * * *.

If the rates prescribed by each paragraph are actually levied by one general provision of the act, why should not the uniform amplitude of each and every paragraph as prescribed by Congress be expressed by a single paragraph? In fact, paragraph 386 is not a duty-levying provision. It neither prescribes nor levies a single rate of duty. But it is a legislative rule of interpretation of the scope of every duty-assessing provision of the act. It is a legislative mandate upon all collectors of customs and the administrative and judicial interpreters of the act as to the inclusiveness of each and every such paragraph and the consequently relative evidence in the application thereof. As such, it should no more be pleaded than any other rule of interpretation, construction, or evidence.

Upon the general principles above discussed see: Arthur v. Morgan (112 U. S., 495); Shell's Executors v. Fauche (138 U. S., 562); Carter v. United States (1 Ct. Cust. Appls., 64; T. D. 31033); Lichtenstein v. United States (idem, 79; T. D. 31105); United States v. Stirn (5 Ct. Cust. Appls., 140; T. D. 34191); United States v. Harlan

et al. (8 Ct. Cust. Appls., 236; T. D. 37947); Shaw v. United States (122 Fed., 443).

In Greeley's Administrator v. Burgess (18 How., 413–416); Mr. Justice Campbell observed:

"This statute was designed for practical use by men engaged in active commercial pursuits, and was intended to superinduce a prompt and amicable settlement of differences between the Government and the importer. The officers of the Government on the one part, and the importer or his agent on the other, are brought into communication and intercourse by the act of entry of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint, and his design to make it the foundation for a claim against the Government."

In the case of Shell's Executors v. Fauche, supra, the Supreme Court said:

"Some allowance must be made for the magnitude of business done at a large port, and the hurry and confusion necessarily incident to its transaction, as well as for the proneness of commercial men to look at the substance of things, rather than at the form in which their ideas are expressed. A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated."

It may be noted here that the present statutory requirement that a protest shall set forth "distinctly and specifically" the reasons (or grounds) for the protestant's objection to the assessment in question has been in force under various tariff enactments for almost a hundred years.

In respect to the controlling decisions of the board and the courts upon the specific question now in hand, there has been great contrariety, and it is almost doubtful whether either view has received a clear preponderance of authority.

In the second circuit, in the case of Hahn v. Erhardt (78 Fed., 620, 1897), the Circuit Court of Appeals held that a protest which claimed certain merchandise to be dutiable under an enumeration of precious stones, was not sufficient to raise the question whether the merchandise should be so classified as similitude. In the same circuit, in the case of United States v. Dearberg (143 Fed., 472, 1905), the Circuit Court of Appeals entered a similar decision, reversing United States v. Dearberg (135 Fed., 245).

In the Third Circuit, in the case of In re Guggenheim Smelting Co. (112 Fed., 517 (1901)), the Circuit Court of Appeals adopted and acted upon the rule that a protest might be sufficient to raise the question of classification by similitude, without special mention of the similitude provisions appearing in it. The point, however, though necessarily involved in the case, was not separately or distinctly discussed by the court in the opinion. An application for a

writ of certiorari for the review of this case was refused by the Supreme Court (186 U. S., 485). In the Balbach Smelting & Refining Co. case, G. A. 5171 (T. D. 23852), Judge Somerville, in a decision sustaining a protest like the present ones as sufficient to invoke the similitude provisions, referred as follows to the refusal of the Supreme Court to review the Guggenheim case:

"The denial of this application by the court can not, in our judgment, be construed in any other light than as disapproving the doctrine announced in the Hahn case, and supports the view necessarily held in the Guggenheim case, that in order to sustain the classification of merchandise under any paragraph of the tariff act on the principle of similitude within the meaning of said section 4, or of other analogous provisions of later acts, it is not essential that the importer should specifically invoke in his protest the benefit of the provisions of this section."

The opposite view, however, was taken by the board in a majority opinion in the Dearberg case, G. A. 6327 (T. D. 27252), and again by the board in an opinion in the Taylor case, G. A. 8062
31 (T. D. 37177).

In this court, however, the present question has been so nearly approached by a recent decision as to bring it fairly within the rule of stare decisis. We refer to the case of the United States v. Snellenburg & Co. (9 Ct. Cust. Appls., 59; T. D. 37939). The question in that case related to certain Wilton rugs imported under the present tariff act. There are three paragraphs of the act which were called into question in the case, and these are now copied in full:

"294. Saxony, Wilton, and Tournay velvet carpets, figured or plain, and all carpets or carpeting of like character or description, 30 per centum ad valorem.

"300. Carpets of every description, woven whole for rooms, and Oriental, Berlin, Aubusson, Axminster, and similar rugs, 50 per centum ad valorem.

"303. Mats, rugs for floors, screens, covers, hassocks, bed sides, art squares, and other portions of carpets or carpeting, composed wholly or in part of wool, and not specially provided for in this section, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description."

It will be observed that paragraph 303, supra, is virtually a similitude clause of limited application, whereby rugs for floors and other portions of carpets or carpeting, composed wholly or in part of wool, and not specially provided for in the act, are made dutiable at the same rate as that imposed upon like carpets by the act. The merchandise in the case was assessed with duty at the rate of 50 per cent ad valorem under the enumeration of carpets woven whole for rooms, within paragraph 300, supra. The importers protested, claiming an assessment at the rate of 30 per cent ad valorem under the enumeration of Wilton carpets, within paragraph 294, supra. The protest contained no specific reference to either the general similitude provisions of the act nor to the provisions of paragraph 303, supra.

The court nevertheless sustained the protestants' claim for an assessment of the merchandise under paragraph 294, supra, by virtue of the quasi-similitude provisions of paragraph 303, supra, and upon this subject the court speaking by Montgomery, presiding judge, said:

"It will be noted that both the collector and the importers treated these goods as carpets. The question that is raised is that, inasmuch as the importers failed to refer to paragraph 303, which provides that rugs for floors not specially provided for shall be subjected to the rate of duty imposed upon carpets or carpetings of the like character or description, the importers should not be permitted to claim under this provision.

"The sole effect of this provision is to direct that when rugs of the character described are found in an importation they shall
32 be carried into paragraph 294 and subjected to the duty therein provided. They are rated as carpets. The collector is presumed to understand the provisions of the law, and that he was not misled by the reference in the protest to these goods as carpets is made manifest from the fact that he himself rated them as carpets 'woven whole for rooms.'

"The question is quite similar to that involved in the case of the Michelin Tire Co. v. United States (6 Ct. Cust. Appls., 283; T. D. 35507), in which it was held in effect that where the basic rate was pointed out the collector would have no difficulty in applying the rate with any added percentage imposed by other terms of the law."

We regard the principle of the foregoing decision to be controlling of the question now in hand, and accordingly hold that the present protests were sufficient to entitle the importers to relief by similitude under the clause cited by them. The decision of the board is therefore reversed, and the cause is remanded for the sustaining of the protests as above indicated.

Reversed.

BARBER, Judge, dissents.

JUDGMENT.

United States Court of Customs Appeals.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 1st day of May, A. D. 1920.

* * * * * * *

M. RICE & COMPANY, J. G. NEIDINGER, APPELLANTS,
v.
THE UNITED STATES, APPELLEE. } No. 2017.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is

Ordered, That the decision of the Board of United States General Appraisers be, and the same is hereby, reversed, and the merchandise

covered by said appeal is held to be dutiable at 25 per centum ad valorem by similitude with cut flowers, preserved or fresh, under paragraph 210 of the tariff act of 1913; and said appeal is remanded to said board for proper action in the premises.

* * * * * * *

(Signed) JAMES F. SMITH,
Acting Presiding Judge.

33 CERTIFICATE RE MANDATE OF COURT OF CUSTOMS APPEALS.

United States Court of Customs Appeals.

M. RICE & CO. AND J. G. NEIDINGER, APPELLANTS,
v.
THE UNITED STATES, APPELLEE. } No. 2017.

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 1st day of May, 1920, was issued to the Board of United States General Appraisers on the 3d day of June, 1920.

(Signed) ARTHUR B. SHELTON, *Clerk.*

CLERK'S CERTIFICATE.

United States Court of Customs Appeals.

M. RICE & CO. AND J. G. NEIDINGER, APPELLANTS,
v.
THE UNITED STATES, APPELLEE. } No. 2017.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages numbered 1 to 33, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 30th day of July, A. D. 1920.

[SEAL.]

ARTHUR B. SHELTON,
Clerk.

34 RETURN TO WRIT.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari, and in pursuance of the stipulation of the parties which is hereto attached, I hereby certify that the transcript of record furnished with

the application for the writ of certiorari in the case of M. Rice & Company and J. G. Neidinger v. The United States, No. 2017, is a full, true, and complete copy fo the transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this 19th day of October, A. D. 1920.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

35 In the Supreme Court of the United States.
October term, 1920.

THE UNITED STATES, PETITIONER,
v.
M. RICE & COMPANY AND J. G. NEIDINGER. } No. 462.

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Court of Customs Appeals to the writ of certiorari granted therein.

New York, N. Y., October 18, 1920.

WM. L. FRIERSON
(By BERT HANSON),
Solicitor General.
J. STUART TOMPKINS,
Counsel for Respondent.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which M. Rice & Company and J. G. Neidinger are appellants, and the United States is appellee, No. 2017, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed into the Supreme Court of the United
37 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and pro-

ceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Endorsed:) File No. 27819. Supreme Court of the United States, No. 462, October Term, 1920. The United States vs. M. Rice & Company et al. Writ of certiorari. Received October 20, 1920. Office of the clerk Supreme Court U. S.

38 (Endorsed:) File No. 27819. Supreme Court U. S. October term, 1920. Term No. 462. The United States, petitioner, vs. M. Rice & Company et al. Writ of certiorari and return. Filed Oct. 20, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES, PETITIONER,
v.
M. RICE & CO. AND J. G. NEIDINGER. } No. 114.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES, PETITIONER.

STATEMENT OF THE CASE.

This case is before the court on a writ of certiorari to review a judgment of the United States Court of Customs Appeals (10 Ct. Cust. Appls. —; T. D. 38403) reversing a judgment of the Board of United States General Appraisers (Abstract 43391; 37 Treas. Dec. 355) which overruled two protests of importers against decisions of the collector of customs at Philadelphia.

THE FACTS.

The merchandise, *immortelles*, was assessed for duty by the collector at 60% ad valorem as ornamental flowers under paragraph 347, tariff act of

1913 (38 Stat., 114, 148), the pertinent part of which reads as follows:

> * * * artificial and ornamental fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, * * *

The importers filed protests against this assessment claiming that the merchandise (quoting from their protests, R. 4, 9)

> is properly dutiable at the rate of 25% ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh, * * *

The cited provision in paragraph 210, tariff act of 1913 (38 Stat., 114, 133), reads as follows:

> Orchids, palms, azalea indica, and cut flowers, preserved or fresh, * * *

When the protests came on for hearing before the Board of General Appraisers, it was conceded (R. 11, 12) that the merchandise was the same as that in *Bayersdorfer* v. *United States*, 7 Ct. Cust. Appls. 66, but the Government interposed the objection that the protests did not set forth or invoke the so-called "similitude clause" of paragraph 386, and moved that they should be overruled for that reason.

In the Bayersdorfer case, *supra*, immortelles were held to be dutiable *by similitude* under paragraph 386 at the same rate of duty as is prescribed for preserved cut flowers in said paragraph 210, the court pointing out in its opinion (p. 73) that the importers' *protests* claimed the merchandise to be dutiable *by similitude*.

The essential difference, therefore, between the Bayersdorfer case and the case at bar is that in the former the protests invoked the similitude clause while in the latter the protests do not do so.

Paragraph 386 (38 Stat. 114, 152), the first clause of which constitutes the similitude clause, reads as follows:

> 386. *That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned;* and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the ar-

> ticle. If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates. [Italics ours.]

The Board of United States General Appraisers sustained the Government's contention that the similitude clause must be invoked and overruled the protests, one general appraiser dissenting (Abstract 43391, 37 Treas. Dec. 355; R. 12, *et seq.*).

Importers appealed to the Court of Customs Appeals, which reversed the decision of the board, one judge dissenting (*Rice & Co. et al. v. United States*, 10 Ct. Cust. Appls. —; T. D. 38403; R. 22, *et seq.*).

THE ISSUE.

The issue in this case presents the broad, fundamental question whether paragraph N of the tariff act of 1913 (38 Stat. 114, 187), which prescribes that a protest shall set forth "*distinctly* and *specifically* * * * the reasons for his [the importer's] objections" to the collector's decision, is complied with where a protest does not set forth or invoke the *similitude clause* of paragraph 386; and, furthermore, whether such a protest is sufficient in law to support the classification of the importer's merchandise *by similitude*.

In its opinion the court below stated the issue in the following language (R. 22):

> It is now conceded that the merchandise was erroneously assessed, and that it was dutiable at the rate of 25 per cent ad valorem by *similitude* with "cut flowers, preserved or

> fresh," as enumerated in the first clause of paragraph 210, being the clause cited in the protests. (*Bayersdorfer & Co.* v. *United States*, 7 Ct. Cust. Appls. 66; T. D. 36390.) The sole question in the present case, therefore, is whether the importers' failure to specify in the protests that they were claiming assessment under the first clause of paragraph 210 aforesaid *by similitude* under paragraph 386 of the act as well as by direct enumeration forbids a decision sustaining the protests under that clause *by similitude*. In other words, is it necessary that protestants shall specifically plead the *similitude provisions* in their protest in order to secure relief thereunder? [Italics ours.]

The assignments of error below specifically raising this issue alleged that the Board of General Appraisers erred (R. 2)—

> (3) In holding that the protests were defective or insufficient.
>
> (4) In not holding that the protests were sufficient.
>
> (5) In holding that the similitude clause, to be availed of by an importer, must be specifically invoked in his protest.
>
> (6) In not holding that protests which claim the correct paragraph and rate under which the goods should have been assessed are not fatally defective or insufficient merely because they fail to cite the similitude clause or paragraph number thereof, which applies to all the dutiable sections of the tariff act.

ARGUMENT.

I.

The protests are not sufficient in law to support the judgment rendered thereon by the Court of Customs Appeals, and did not confer jurisdiction upon that court to render such judgment.

(a) Consideration of fundamental principles involved in determining the sufficiency of protests.

The case presents purely a question of law, namely, whether the importers, having invoked their statutory right to protest against the decision of the collector of customs, have complied with the requirements set forth in said paragraph N. If there was failure to comply with the statute, the protests were fatally defective and the court below was without jurisdiction to grant the relief sought by the importers. The pertinent part of paragraph N reads as follows:

> That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise * * * shall, within thirty days after but not before such ascertainment and liquidation of duties, * * * if dissatisfied with such decision imposing a higher rate of duty, * * * file a protest or protests in writing with the collector, *setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto,* * * *.

> Upon such payment of duties, protest, and deposit of protest fee, the collector shall transmit the invoice and all the papers and exhibits connected therewith *to the board of nine general appraisers, for due assignment and determination as provided by law;* * * * [Italics ours.]

This paragraph is the sole provision of law which gives importers the remedy by "protest" to recover from the United States duties paid upon imported merchandise; and by virtue of the same paragraph, in conjunction with subsection 12 of section 28, tariff act of 1909 (36 Stat. 11, 98), the Board of General Appraisers is given jurisdiction and power to hear and determine issues raised by such protests. It follows, in order that such a protest may serve the purpose of invoking the jurisdiction of the board, that it must comply with all the requirements of paragraph N, and particularly that it must set forth "distinctly and specifically" the reasons for importer's objections to the collector's decision.

The Government contends that the protests at bar are not sufficient in that they do not set forth the *similitude clause* in paragraph 386 upon which the importers relied at the trial (and had to rely) in order to bring their cases within the Bayersdorfer decision, *supra*. In other words, the protests as filed limited the board's jurisdiction to determining whether the immortelles were dutiable under paragraph 347, as assessed by the collector, or under paragraph 210, as claimed by importers, and they did not confer upon it jurisdiction to determine whether the immortelles were dutiable

under the similitude provision, *which was not mentioned in the protests.*

One of the earliest cases in which this court dealt with this question is *Davies* v. *Arthur*, 96 U. S. 148, decided in 1877, in which Mr. Justice Clifford said (p. 149):

> Persons importing merchandise are required to make their protests *distinct and specific*, in order to apprise the collector of the nature of the objection, before it is too late to remove it, or to modify the exaction, and that the proper officers of the Treasury may know what they have to meet, in case they decide to exact the duties as estimated, notwithstanding the objection, and to expose the United States to the risk of litigation. *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461.

* * * * *

(pp. 151, 2):

> Unless the protest is made in writing, and is signed by the claimant within ten days after the ascertainment and liquidation of the duties, setting forth *distinctly and specifically* the grounds of objection to the payment, no action of the kind against the collector can be maintained to recover back the duties as having been illegally exacted. * * * He must set forth in his protest the grounds upon which he objects, *distinctly and specifically*, the reason being, as ruled by Chief Justice Taney, that the words of the act requiring the protest are too emphatic to be overlooked in the construction of the provision. *Mason* v. *Kane*, Taney's Dec. 177.

Mistakes and oversights will sometimes lead to irregular assessment, and the object of the requirement is to prevent a party, if he suffers the mistake or oversight to pass without notice, from taking advantage of it when it is too late to make the correction, and to compel him to disclose the grounds of his objection *at the time when he makes his protest.*

Protests of the kind must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show *that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character*, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated. *Burgess* v. *Converse*, 2 Curt. 223.

Two objects, says Judge Curtis, were intended to be accomplished by the provision in the act of Congress requiring such a protest: 1. *To apprise the collector of the objections entertained by the importer*, before it should be too late to remove them, if capable of being removed. 2. *To hold the importer to the objections which he then contemplated, and on which he really acted*, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed, by the payment of the money into the Treasury.

Warren v. *Peaslee*, 2 Curt. 235; *Thomson* v. *Maxwell*, 2 Blatch. 392. [Italics ours.]

See also:

Arthur v. *Morgan*, 112 U. S. 495;
United States v. *Salambier*, 170 U. S. 621;
Heinze v. *Arthur's Executors*, 144 U. S. 28.

The foregoing citations show that the two cardinal tests applied by this court in ascertaining whether a protest sets forth "distinctly and specifically" the reason for the objection to the collector's action are:

(1) Does the protest apprise the collector of the objection of the importer in such a way as to enable him to consider the protest with the view to granting its demand?

(2) Does the protest show on its face that the objection made at the trial was in the mind of the importer at the time he filed his protest?

(b) Settled principles relating to the disposition of protests by collectors of customs and the Board of General Appraisers.

If the collector does not concede the claim of the protest, he is required by the statute (paragraph N, *supra*) to "transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as provided by law." Before the board there are no pleadings. The case goes to trial on the issues raised by the protest. There is a presumption that the collector's decision was right. (*Arthur* v. *Unkart*, 96 U. S., 118, 122.) The protestant

bears a double burden: (1) He must establish that the collector's decision was wrong; and (2) he must prove that the claim relied upon in his protest is correct; and even should he establish that the collector's decision was wrong, he will fail if his protest does not make the correct claim.

> *Benjamin Iron & Steel Co.* v. *United States*, 2 Ct. Cust. Appls. 159, 162; *United States* v. *Kupper*, 6 Ct. Cust. Appls. 142; *Davies* v. *Arthur*, 7 Fed. Cas., p. 43, affirmed in *Davies* v. *Arthur*, 96 U. S. 148.

(c) *Consideration of the sufficiency of the protests at bar.*

The question in the instant case is whether importers' protests conform to the requirements of paragraph N, *supra*. It is conceded that the collector's classification under paragraph 347 was erroneous. The protests claim that the immortelles are "properly dutiable * * * *under* the first clause of paragraph 210 as palms or cut flowers preserved or fresh." They do not invoke the similitude clause.

(d) *Analysis and application of the similitude clause.*

The similitude clause is here repeated for convenience:

> "386. That each and every imported article, not enumerated in this section, which is similar either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, *shall pay the same rate of duty*

which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; * * *." [Italics ours.]

The italicized portion clearly indicates that the similitude clause is a duty-levying provision: that is, articles which are not specifically enumerated in any of the dutiable paragraphs of the tariff act of 1913 are made dutiable *thereunder*, if they are similar in any of the respects named to an enumerated article, at "the same rate of duty" which is levied on such enumerated article.

A brief analysis of the arrangement of section I of the tariff act of 1913 may be helpful. It is divided into two parts, denominated the "Dutiable List" and the "Free List." The first 384 paragraphs of the dutiable list relate to specifically enumerated articles and materials. Then follow the so-called "catch-all" paragraphs 385 and 386.

Paragraph 385 (38 Stat. 114, 152) levies specific rates of duty on *nonenumerated* articles. So far as we are able to find, it has never been contended that paragraph 385 need not be invoked in a protest in order to secure classification thereunder.

Paragraph 386, the first clause of which is the similitude clause, also relates to *nonenumerated* articles. So far as the levying of duties is concerned, the only difference between the two paragraphs is that paragraph 385 prescribes two specific rates of duty, while the similitude clause of paragraph 386 prescribes rates of duty by reference to other paragraphs in the dutiable list. In other words, both of

these paragraphs are "catch-all" provisions imposing duties upon *nonenumerated* articles.

In *Sykes* v. *Magone*, 38 Fed. 494, 496, Judge Lacombe said:

> There are a number of articles as to which no duty is to be paid. Those figure on the free list. With regard to about everything else which comes here, Congress has undertaken to prescribe the specific rate of duty which it shall pay. Of course to do this by a verbal enumeration of every known article, whether a natural growth or a product of manufacture, would be practically impossible. So, after enumerating with greater or less detail, and by special or general terms, such articles as it occurs to them to enumerate in that way, the framers of these tariff acts have devised various *catchall clauses*, in order to prevent any articles, which should in their judgment pay duty, from slipping through. *One of these catchall clauses is known as the "Similitude Clause."* It provides that if an article is brought to one of our ports of entry, which is not enumerated by general or special name anywhere in the long lists of dutiable articles, then inquiry shall be made as to whether it bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in these several lists. Further, the same section provides that if the article be found to equally resemble two different articles on these lists, bearing different rates of duty, *then the rate of duty assessed upon the article* shall be that

> which is assessed on the higher of the two articles to which it bears a similitude. Finally, in case all the other *catchall clauses* (for there are others, to which I need not refer) should fail to hold the article, there is a general provision that upon every manufactured article not enumerated or otherwise provided for in the act *there shall be a duty of 20 per cent.* * * *. [Italics ours.]

It is well settled that the provisions of paragraph 385 can not be invoked until the similitude clause of paragraph 386 has been exhausted; that is, if a nonenumerated article falls within the terms of the similitude clause it can not be classified under paragraph 385. (*Johnson & Co.* v. *United States*, 10 Ct. Cust. Appls. —; T. D. 38333; *Hahn* v. *United States*, 100 Fed. 635.) This again shows how intimately these two paragraphs are associated.

If paragraph 385 must be invoked in a protest to secure classification thereunder, it would seem that the same rule should also apply to the similitude clause in paragraph 386, as both provisions are the means of levying duties upon *nonenumerated* articles. As above stated, the similitude clause *directs* the assessment of duty, though some other paragraph must be cited in connection therewith to furnish the basis for similitude and establish the applicable rate of duty. For example, the protests under consideration should have claimed the merchandise dutiable at 25 per centum ad valorem as an unenumerated article under paragraph 386 by similitude to preserved cut flowers in paragraph 210.

If, in order to find classification by similitude under paragraph 386, an article must be *nonenumerated*, how can it be said that an allegation in a protest that an article is *enumerated* in a certain paragraph brings to the attention of the collector the fact that the protestant claims that it is a *nonenumerated* article? It is quite obvious that such would not be the effect of such a protest.

There was nothing in the instant protests *themselves* which would have caused the collector to consider whether the immortelles were dutiable under the similitude clause. As *similitude* is a question of *fact*, being the determination of whether an unenumerated article is similar either in material, quality, texture, or use to some enumerated article, it is quite obvious that a protest which invokes the similitude clause calls upon the collector to consider an entirely different state of facts from one which claims that the merchandise is in fact a specifically enumerated article. Applying this test to the instant case, under the protests as filed it was the duty of the collector to consider whether immortelles are *in fact* preserved cut flowers under paragraph 210; while under a protest invoking the similitude clause, in conjunction with paragraph 210, it would be his duty to consider whether immortelles (being in fact *not* preserved cut flowers) were similar in "material, quality, texture, or use" to preserved cut flowers. The distinction is quite plain.

Furthermore, there is no justifiable presumption that importers *intended* their protests to embrace

the similitude clause *when they filed them.* The *Bayersdorfer* case, *supra*, was decided May 1, 1916. One of the protests (852149, R. 9, 10) was filed April 16, 1916—*before* that decision; the other one (852150, R. 4, 5) on July 7, 1916—a short time after the decision. Can it be said that the importer who filed his protest the *month before* the decision in the Bayersdorfer case had in mind that decision applying the similitude clause to immortelles?

Again, the two protests being identical as to the claims made, can one of them be held to support a similitude claim because it was filed *after* the *Bayersdorfer* decision, and the other one not to do so because it was filed *before* that decision? *The protest alone gives the Board and the court jurisdiction to consider and determine whether an assessment is proper.*

It is probable that when filing their protests the importers had in mind that immortelles were *in fact* "cut flowers, preserved or fresh," and therefore specifically covered by that provision in paragraph 210. That contention had been made before by the same importers in *Bayersdorfer* v. *United States*, 4 Ct. Cust. Appls., 446, which was decided in 1913. In that case importers also further contended that for a long period of time immortelles had been assessed for duty as cut flowers, preserved or fresh, and argued for the application of the rule of long-continued administrative practice followed by legislative adoption.

(*e*) *Similitude is a question of fact.*

It is well established that similitude can not be availed of by an importer except upon *proof of facts* establishing similitude in some one of the particulars prescribed in the similitude clause. (*Herrman* v. *Arthur*, 127 U. S. 363.) It is elemental that evidence will not be received except such as is in support of a material allegation in the pleadings. In the case at bar the offered stipulation of fact that the merchandise is the same as that which was the subject of the Bayersdorfer case, *supra*, is expressly subject to the government's objection that the protests are insufficient to admit of the receipt of the proof furnished by the stipulation in that they do not invoke the similitude clause.

In cases where similitude is claimed in a protest the protestants put the collector upon enquiry to determine the fact of similitude in any one of the four statutory particulars. If protestant does not claim similitude, it is a work of supererogation for the collector to waste time in an effort to determine whether these or any other material facts pertain to the merchandise. Otherwise it would impose tremendous burdens upon the collector in cases where numerous claims are made in the protest.

Liebenroth v. *Robertson*, 144 U. S. 35, decided March 14, 1892, was an action originally brought in the Superior Court of the City of New York by importers against the collector of the port of New

York to recover duties paid him. The opinion states (p. 36):

> There is a bill of exceptions, which shows that the substantive part of the *protest* was as follows: "We hereby protest against your decision and assessment of duties * * * claiming that, under existing laws, *and section 2499* and Schedule M, act of March 3, 1883, said goods are liable to only 15% ad val." * * * [Italics ours.]

This shows that at that early day it was deemed necessary to invoke section 2499, act of 1883, the provision of the law corresponding to paragraph 386, act of 1913, i. e., the similitude clause. In fact, the reported cases in which the importers' claims are founded upon the similitude clause usually show that they invoked the clause in their protests.

See:

> *Robins* v. *United States*, 1 Ct. Cust. Appls. 252;
>
> *Gross* v. *United States*, 1 Ct. Cust. Appls. 321, 322;
>
> *United States* v. *Hirsh & Schofield*, 8 Ct. Cust. Appls. 163, 164.

(f) The similitude clause is not a rule of interpretation; it is a duty-levying provision.

Although the court below said (R. 24): "It is true, strictly speaking, that the similitude paragraph is itself in a sense an assessing paragraph," yet it adopted the theory that it is "a legislative rule of interpretation of the scope of every duty-assessing provision of the act." This theory is predicated upon

the assumption that the immortelles are dutiable *under* paragraph 210. We contend that the *Bayersdorfer* case held them to be dutiable *under the similitude clause* at "*the same rate of duty* which is levied on" preserved cut flowers in paragraph 210; hence, the similitude clause is obviously something more than a rule of construction.

A *statutory* rule of construction is a rule to be followed in the interpretation and application of a statute. The similitude clause is not such a rule, because it levies duties upon unenumerated articles. It does not lay down a rule for the interpretation and application of *other* paragraphs of the tariff act. On the contrary, other paragraphs must be employed in *its* application.

That the similitude clause is a duty-levying provision is further emphasized by the second clause of paragraph 386, reading:

> and if any *nonenumerated* article equally resembles two or more enumerated articles on which different rates of duty are chargeable, *there shall be levied* on such nonenumerated article *the same rate of duty* as is chargeable on the article which it resembles paying the highest rate of duty;

The so-called mixed-materials clause of paragraph 386 also *assesses duty* on *unenumerated* articles falling within its terms, viz:

> on articles *not enumerated*, manufactured of two or more materials, the *duty shall be assessed* at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value;

In this connection it is interesting to note the phraseology of section 20 of the act of 1842, which provided:

> That *there shall be levied, collected, and paid* on each and every *nonenumerated* article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, *the same rate of duty* which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned. [Italics ours.]

In *Moe* v. *Churchill*, 44 Fed. 50, the issue related to the third clause of section 2499, act of March 3, 1883, the mixed-materials clause. The first clause of that section was the similitude clause, as to which the court said in its opinion (p. 51):

> In *Arthur* v. *Fox*, 108 U. S. 128, 2 Sup. Ct. Rep. 371, Chief Justice Waite held, in substance, that section 2499 only applies when an article is *not enumerated* in the schedules. He says that if an article is found not enumerated in the schedules, then the first inquiry should be whether it bears such a similitude to an enumerated article *that it may be assessed under the first, or similitude, clause of section 2499* (Heyl. Dig. 822). [Italics ours.]

In *Biddle* v. *Hartranft*, 29 Fed. 90, the Circuit Court for the Eastern District of Pennsylvania said:

> The only question to be decided in the case is, does the *similitude clause* of the act contain a provision *imposing a tax* upon bichromate of soda? In the opinion of the court, the deci-

> sion of the Supreme Court in the cases cited in the argument settles this question beyond controversy, and renders it liable to the same duty which is imposed upon the article that it resembles, *thus constituting a provision in law for its taxation.* [Italics ours.]

The foregoing excerpts show (1) the sharp distinction drawn between enumerated and *non*-enumerated articles; and (2) the tendency of the courts to regard the similitude and the mixed-materials provisions of the tariff laws as duty-imposing provisions and not as rules of interpretation.

(*g*) *The effect of the decision below upon the administration of the customs laws.*

In considering this case it seems pertinent to note the effect of the decision of the court below upon the administration of the customs laws. Under its holding the collector is called upon to consider *every* protest that is presented to him in a double light, viz: (1) Whether the merchandise under consideration is dutiable *directly* under the one or more (sometimes *many*) paragraphs named in the protest, and also (2) whether it may be dutiable *by similitude* under paragraph 386 at the same rate of duty prescribed in any of the paragraphs named in the protest. This would be an endless undertaking, especially at the port of New York, where thousands of protests are filed with the collector in the course of a year, and more especially in view of the fact that the question of similitude is one of *fact* which must be ascertained from *proof* and would necessitate

calling witnesses by the collector to determine that question of fact. Surely the law was not designed to impose that duty upon the collector in cases where importers have not called his attention in a protest to the fact that they contend the merchandise in question to be dutiable *by similitude*.

Similitude is rather difficult of application and is resorted to comparatively little in customs practice and litigation; yet the decision below places upon the collector the duty to raise and consider and decide the question of similitude in connection with *every* protest presented to him, though the protest itself does not invoke the similitude clause. This imposes upon collectors a duty manifestly not contemplated by the statute.

The foregoing serves to show not only the reasonableness of, but also the practical necessity for, requiring an importer who intends to rely upon similitude to state in his protest two things: (1) That he claims his merchandise to be dutiable by similitude, and (2) the particular paragraph of the act to which the claimed similitude lies. Only in this way is the real claim of the importer brought "distinctly and specifically" to the attention of the collector, so that he can act upon the protest intelligently.

This suggests another thought: Even in a case where the protest invokes the similitude clause the collector is called upon to make a *fourfold* investigation and consideration of the claim (sometimes in respect to many paragraphs named in a protest), namely, in which of the *four* particulars named in

the clause—*material, quality, texture,* or *use*—the merchandise under consideration is similar to some article enumerated in the act. This, it would seem, places a sufficient burden upon the collector without extending it to the extent the court below has done.

(h) The Administrative Practice relating to the application of similitude.

Consideration of the effect of the decision below upon the administration of the customs laws also suggests a consideration of the customs administrative practice in relation to the similitude clause. It is well settled that an established administrative practice is often adopted as a guide in the interpretation of tariff provisions.

In *Komada* v. *United States*, 215 U. S., 392, 396, this court, by Mr. Justice Brewer, said:

> Something can be said on both sides of the question of similarity, and if the case turned simply upon that question it might be difficult to reach a satisfactory conclusion. In such a case *the construction given by the Department charged with the execution of the tariff acts is entitled to great weight.* As said by Mr. Justice McKenna, delivering the recent opinion of the court in *United States* v. *Hermanos*, 209 U. S., 337, 339:
>
> "We have said that when the meaning of a statute is doubtful *great weight should be given to the construction placed upon it by the Department charged with its execution. Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Healey*, 160 U. S., 136. And we have decided that the reenactment by Congress, without

> change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S., 143, 152."
>
> In the decision of this case Mr. Justice White and Mr. Justice Peckham concurred *solely because of the prior administrative construction*. [Italics ours.]

Judicial notice may be taken, from the reported cases cited in this brief, and others, that collectors in considering protests give consideration to the similitude clause *only* when it is invoked by importers in their protests. Were this not the practice the cases involving the issue whether the similitude clause must be invoked in protests would not have arisen.

This long-continued administrative practice should therefore, we submit, be given due consideration in the determination of the issue at bar.

II.

Discussion of cases in which the precise question whether the similitude clause must be invoked in a protest has been considered by the Board of General Appraisers and the courts.

This question was passed upon squarely in the case of *Hahn* v. *Erhardt*, 78 Fed. Rep. 620, decided by the Circuit Court of Appeals, Second Circuit, on February 1, 1897. The Circuit Court had excluded evidence offered by importers to establish similitude upon the objection that the protest was insufficient to authorize a recovery under the similitude clause

of the tariff act of March 3, 1883, because that provision was not invoked in the protest. This ruling was duly excepted to and its correctness challenged by the assignments of error on appeal to the Circuit Court of Appeals. We quote from the opinion of Judge Wallace (pp. 621, 622):

> The case presents the single question whether, under such a protest, the importer could be permitted to claim that the duties were erroneously exacted because his importations should have been classified as precious stones by force of the *similitude provision* of the tariff act.
>
> The statute which precludes an importer from recovering duties which have been erroneously exacted, unless he has made a protest in writing, "setting forth distinctly and specifically the grounds of objection," has always been construed as requiring the objection to be *so distinct and specific as to advise the collector exactly what the error complained of is.* "Technical precision is not required, but the objections must be so distinct and specific as, when fairly construed, *to show that the objection taken at the trial was at the time in the mind of the importer*, and *that it was sufficient to notify the collector of its true nature and character*, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." *Davies* v. *Arthur*, 96 U. S. 148.
>
> The similitude provision is intended *to prescribe the duty* to which articles are to be

subjected that have been omitted in the enumeration of dutiable articles in the schedules of the tariff laws. It has no application when the imported article can be identified with any of those described in any of the schedules. If the importer asserts in his protest that his merchandise belongs to the category of enumerated articles, *he asserts by implication that its dutiable character is not to be ascertained by reference to the similitude provision.*

The similitude provision creates a test or criterion for ascertaining whether, although the article is not enumerated, it is nevertheless better capable of identification by reason of similarity in one or more specified particulars with some one rather than with any other enumerated article, *and subjects it* to the same rate of duty imposed upon the enumerated article which it most resembles. In one sense, it is a rule of construction for the guidance of customs officers; but its application always involves an inquiry of fact,—the determination of the question, depending more or less upon expert knowledge, whether, in material, in quality, in texture, or in the use to which it is to be applied, the article more nearly resembles one enumerated article than another.

The protest in the present case would naturally lead the collector to inquire whether the importations were "precious stones," in the commercial acceptation of that term; and certainly it would not give him notice that the importer intended to claim that, although they were not precious stones, yet, because they were of the same material, or be-

cause they were capable of the same use, they more nearly assimilated to precious stones than to any other enumerated article.

We conclude that in all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff schedules, and means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision, *he should state the fact in his protest*, and, *if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute.* * * * [Italics ours.]

From the foregoing it is obvious that the court was fully mindful that in construing protests technical precision is not required, but that at the same time the objections must be so clearly stated in a protest as to apprise the collector of the claim intended to be made, and to show that the objection taken at the trial was in the mind of the importer at the time the protest was filed.

The *Hahn* case was followed by the board in T. D. 22161, G. A. 4699 (3 Treas. Dec. 364), decided April 16, 1900.

The next case touching upon this question is *In re Guggenheim Smelting Co.*, 112 Fed. Rep. 517, decided by the Circuit Court of Appeals, Third Circuit, on December 26, 1901. While in the opinion the similitude provision of Section 4, tariff act of 1894, was referred to, it is manifest that the question with which we are concerned in the case at bar was

not presented to or argued before the court. The *Hahn* case, *supra*, was not called to the court's attention; therefore its decision can not be held to have expressly overruled the holding in that case. Neither should it be considered as in effect overruling that decision for the issue here in question was not considered; furthermore, the court was influenced in arriving at its conclusion by other considerations The opinion states (p. 519):

> The specific enumeration, however, of all articles intended to be free of duty, and the provision made by *sections 4 and 21* of the act, as well as the fact that the protest of the importer points out paragraph 165 as that under which duty should be paid, brings us to the conclusion that a duty on the importation in question should be imposed under paragraph 165.

That section 21 was largely instrumental in causing the court to arrive at its conclusion is evident, for it said later in its opinion (p. 520) that that section "makes effective the provisions of section 4, *taken in connection therewith*, and renders it more readily applicable to the case in hand." [Italics ours.] While it seems that the decision to some extent applied similitude it is obvious from the opinion that no point was made before the court that this was not a proper course because the similitude clause had not been invoked in the protest.

The case of *Balbach Smelting & Refining Co.*, T. D. 23852, G. A. 5171 (5 Treas. Dec. 557), was decided by

the board on July 2, 1902. In its opinion the board discussed the Guggenheim case, *supra*, at considerable length. We quote the following (p. 560):

> We are officially advised that an application was made to the Supreme Court of the United States for a writ of certiorari, in order to review certain alleged errors of the circuit court of appeals in the Guggenheim case (*supra*), and that the application was denied. We have before us the brief of the Attorney General, filed in support of the application, from which we make the following extract:
>
> "The importers' protest specified paragraph 165 only and did not rely on the similitude clause. Nor did their argument below appeal to the similitude principle, but was wholly taken up with an attempt to show that base bullion is lead ore or lead dross rather than lead in pigs and bars or molten lead, etc.; that 'in reality "base bullion" is a silver ore.'
>
> "The question is thus presented whether, when the proper provision regulating the duty has not been specifically invoked and pleaded in the protest, the court may thus apply it for the importers' benefit."

The Attorney General also called the attention of the court to the ruling of the circuit court of appeals for the second circuit in *Hahn* v. *Erhardt* (78 Fed. Rep. 622; 24 C. C. A. 265), where it was expressly held that—

> "In all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff schedules and

means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision, he should state the fact in his protest, and, if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute."

The argument was made by the Attorney General that the decision in the Guggenheim case was in direct conflict with that in the Hahn case made by a court of equal authority, and that for this reason the application should be granted.

The respondents' brief in opposition to the application for certiorari contended that the principle announced in the Hahn case was erroneous, and among other authorities in support of that view cited the case of United States *v.* Salambier (170 U. S. 621; 18 Sup. Ct. Rep. 771).

The denial of this application by the court can not, in our judgment, be construed in any other light than as disapproving the doctrine announced in the Hahn case, and supports the view necessarily held in the Guggenheim case, that in order to sustain the classification of merchandise under any paragraph of the tariff act on the principle of similitude within the meaning of said section 4, or of other analogous provisions of later acts, it is *not* essential that the importer should specially invoke in his protest the benefit of the provisions of this section.

Whether the board's interpretation of the denial by this court of the application for a writ of certiorari in

the Guggenheim case was justified will be discussed later.

In *Hamano* v. *United States*, 1 Estee's Hawaii Rep. 344 (T. D. 24946; 7 Treas. Dec. 114), decided January 6, 1903, the District Court for the District of Hawaii, Estee, D. J., in a lengthy and well reasoned opinion citing the *Hahn* case, *supra*, the *Guggenheim* case, *supra*, and others, held that it was necessary to invoke the similitude clause in a protest, saying (p. 118):

> It seems clear to this court that if the importer had intended in this case from the beginning to rely upon the *similitude clause* of the customs administrative act for the purpose of identifying his merchandise, *he should have "distinctly and specifically set forth" that fact in his protest* to the collector as one of his specific objections to the collector's rulings. It is not possible for this court to now consider on appeal any ground of protest unless made to the collector at the time the classification was made, and the question of the similitude of these shoes was not so made. [Italics ours.]

In *Dearberg's* case, T. D. 25134, Abstract 775, (7 Treas. Dec. 481), decided March 16, 1904, the board again followed the Guggenheim case, *supra*. On appeal the board was affirmed by the Circuit Court, Hazel, D. J., in *United States* v. *Dearberg*, 135 Fed. Rep. 245, decided November 11, 1904.

That decision was appealed to the Circuit Court of Appeals, Second Circuit, and was reversed December 22, 1905, in *United States* v. *Dearberg*, 143 Fed. Rep. 472, without opinion, however. But the

statement of the case, as reported, sets forth that the board, on the authority of the *Balbach* case, *supra*, held it was not necessary to invoke the similitude clause; that this was contrary to a prior decision of the Circuit Court of Appeals for the Second Circuit in the *Hahn* case, *supra;* that since the decision in the *Hahn* case the Circuit Court of Appeals for the Third Circuit, in the *Guggenheim* case, *supra*, had applied the similitude clause, though the protest had not invoked it; that the Government had applied to this court for a writ of certiorari on the ground that the decision was contrary to that in the *Hahn* case, which application was denied (*United States* v. *Guggenheim Smelting Co.*, 186 U. S. 485); that the board construed the action of this court as a disapproval of the doctrine announced in the *Hahn* case, and as approving the decision in the *Guggenheim* case; and that the Circuit Court affirmed the decision of the board on similar considerations.

Examination of the record and briefs in the case also shows that the sole issue presented to and argued before the court was the one of sufficiency of the protest in relation to the similitude claim. The only "point of law" urged in the Government's brief was as follows: "*The decision in Hahn* v. *Erhardt, 78 Fed. Rep., 620 (Circuit Court of Appeals, Second Circuit), is decisive of this appeal.*"

It is manifest, therefore, that the Circuit Court of Appeals, Second Circuit, in reversing the Circuit Court, after full consideration, did not approve the interpretation placed by it and the board upon the

action of this court in denying the application for a writ of certiorari in the *Guggenheim* case, and adhered to its previous decision in the *Hahn* case. It did not write an opinion for the obvious reason that it had already fully stated its views in the Hahn case, *supra*.

This was the view taken by the board (one general appraiser dissenting) in T. D. 27252, G. A. 6327 (11 Treas. Dec. 493), decided March 29, 1906. The opinion, by General Appraiser Howell, after setting forth the history of the board's decision in Abstract 775, *supra*, and the subsequent appeals therefrom, said (pp. 494, 495):

> The circuit court affirmed the decision of the board in *United States* v. *Dearborg* (135 Fed. Rep. 245; T. D. 25782). On further appeal to the circuit court of appeals, the decisions of the circuit court and of the board were reversed without opinion (T. D. 27008).
>
> This action of the circuit court of appeals in reversing the decision of the circuit court and of the board, has the effect of reaffirming the conclusion reached in the Hahn case. * * *
>
> We feel constrained to follow this decision as being the latest judicial expression of opinion on this subject, and in doing so we are also following the decision of the highest court in the jurisdiction in which this case arose.

In T. D. 30223, G. A. 6959 (18 Treas. Dec. 440), decided December 24, 1909, the board again refused to apply the similitude clause where it had not been invoked in importer's protest.

In T. D. 37177, G. A. 8062 (32 Treas. Dec. 503), decided by the board May 2, 1917, it was again held that the similitude clause must be invoked in a protest.

The cases above reviewed comprise all the decisions which we have been able to find bearing directly on the question now before the court. This argument, so far as the decided cases are concerned, resolves itself into the question whether this court will approve the holding of the Circuit Court of Appeals, *Second* Circuit, in the *Hahn* case, *supra*, reaffirmed by the same court eight years later in the *Dearberg* case, *supra*, in which *the precise question at bar* was passed upon; or whether it will approve the intermediate decision of the *Third* Circuit in the *Guggenheim* case, *supra*, in which the question of similitude *was not a litigated issue*.

We respectfully submit that the holding of the *Second* Circuit is entitled to the favorable consideration and approval of this court. The opinion in the *Hahn* case is a comprehensive, careful, well considered review of the principles applicable in the determination of the sufficiency of protests. The court recognized that a protest is a *business* document rather than a *legal* document, and that importers should not be held to strict rules of construction. However, it also realized that a protest should fairly point out to the collector the nature and character of an importer's claim and should show on its face that the claim urged by an importer at

the trial is the claim which he had in mind when the protest was filed.

Apropos of the interpretation placed by the board and by the Circuit Court upon the refusal of this court to grant the writ of certiorari sought by the Government in the *Guggenheim* case, *supra*, we submit that there is as much reason for ascribing this court's refusal of the writ to the fact that it considered the similitude feature of the *Guggenheim* case unnecessary to the decision thereof; in other words, that the case could as well have been decided the way it was without resort to the similitude clause, as was urged by the Government in its brief in the *Dearberg* case, *supra*, in the Circuit Court of Appeals. It does not necessarily follow that this court, in denying the writ, intended thereby to disapprove the principle of the *Hahn* case, *supra*. Again, this court may not have regarded the issue involved in the *Guggenheim* case of sufficient importance to warrant the granting of the writ.

The court below, after a short recital of the leading cases discussed under this "Point" of our brief, and without *deciding* which of the two conflicting lines of decisions is of the greater authority, said (R. 26):

> In this court, however, the present question has been so nearly approached by a recent decision as to bring it fairly within the rule of *stare decisis*. We refer to the case of the *United States* v. *Snellenburg & Co.* (9 Ct. Cust. Appls. 59; T. D. 37939).

III.

United States v. Snellenburg, 9 Ct. Cust. Appls. 59, is not stare decisis of the issue presented in this case.

The *Snellenburg* case held that a protest claiming classification for Wilton rugs under paragraph 294, act of 1913, as Wilton carpets, was not rendered insufficient by the failure to invoke paragraph 303. The merchandise had been assessed with duty as "carpets * * * woven whole for rooms" under paragraph 300. Paragraph 303 (38 Stat. 114, 143) reads:

> 303. Mats, *rugs for floors*, screens, covers, hassocks, bed sides, art squares, and other portions of carpets or carpeting, composed wholly or in part of wool, and not specially provided for in this section, *shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description.* [Italics ours.]

This paragraph is the last of a group of eleven consecutive paragraphs specifically enumerating and assessing duties on various kinds of carpets and carpeting (paragraphs 293 to 303, inclusive; 38 Stat. 114, 142, 143). They all levy duty upon *enumerated* articles.

Doubtless the special circumstances surrounding the issue involved in that case were largely responsible for the court's determination thereof. The collector was able to determine, and in fact had originally determined, by an examination of the merchandise that it was dutiable as *carpets;* that is,

both the importer and the collector treated it as *carpets.*

There is a manifest difference between holding that the collector is presumed to be familiar with all the paragraphs comprising a limited group of provisions relating to carpets, on the one hand, and holding that he is in every instance bound to take cognizance of and consider the similitude clause, which in its application has relation to *all* the 384 paragraphs of the act imposing duties upon enumerated articles.

The application of paragraph 303 does not involve the principle of *similitude*—the ascertainment of whether an *unenumerated* article is similar in "material, quality, texture, or use" to some *enumerated* article—it only requires the ascertainment of whether the articles *enumerated therein* are made of carpets "of like character or description" as those named in the ten immediately preceding paragraphs.

Paragraph 303 is complementary to, and in effect a residuary clause to, the 10 other carpet provisions immediately preceding it, as it provides for mats, rugs, etc., and other portions of carpets made from the various kinds of carpets enumerated in those paragraphs and prescribes that they shall be subject to the rates of duty imposed on those carpets. Hence, if the collector has before him one of the articles named in paragraph 303 and the importer's protest claims it to be dutiable under the paragraph prescribing the rate of duty for the particular kind of carpet from which it is made (and does not name paragraph 303), it is, perhaps, not unreasonable to

hold that the collector is presumed to be familiar with the terms of paragraph 303 and is not misled by the protest; moreover, the merchandise itself would doubtless aid him in understanding what the importer intended to claim in his protest.

Again, the collector in considering such a protest, and having the merchandise before him, is called upon only to exercise his knowledge and judgment as to whether it is *in fact* made from the kind of carpet covered by the particular paragraph named in the protest. On the other hand, the question of the application of similitude is not one which can ordinarily be determined from an examination of the merchandise *alone;* it requires consideration of evidence upon which the similitude claim is predicated.

Furthermore, when under the Snellenburg decision the collector is called upon to determine whether articles named in paragraph 303 are made of the kinds of carpets named in the 10 preceding paragraphs, the test applied is *identity*. *Similitude*, however, is not *identity*. (*Isler* v. *United States*, 5 Ct. Cust. Appls. 229, 233.) Hence, the application of the similitude clause involves a totally different principle than the application of paragraph 303.

The court below has extended the principle of the Snellenburg case so as to read into the protests the similitude clause, which, as heretofore pointed out, requires consideration of evidence by the collector, aside from the merchandise itself, as to whether, by reason of similitude, the merchandise is dutiable under paragraph 386. The circumstances in the

instant case, we submit, are so different from those in the Snellenburg case that it is not *stare decisis* of the issue here involved.

CONCLUSION.

To sum up, the protests at bar are not sufficient in law to support the judgment of the Court of Customs Appeals because they do not, in compliance with paragraph N, *distinctly* and *specifically* set forth importers' reasons for their objections to the collector's decision in that they do not invoke the similitude clause of paragraph 386.

The similitude clause is a duty-imposing provision and must therefore be invoked in a protest like any other duty-levying provision.

The similitude clause imposes duties upon *nonenumerated* articles; hence, there is as much necessity for invoking it as there is for invoking paragraph 385, which also imposes duties on *nonenumerated* articles.

Similitude is a *question of fact* to be submitted to and decided by the trial court. Of necessity such fact must be claimed or alleged in the protest and made the foundation of the claim provable in court.

The protests in question should have invoked both the similitude clause and the paragraph to which the claimed similitude lies; that is, both paragraphs 386 and 210.

The claim in the protests for classification under paragraph 210 is an allegation that the merchandise is *enumerated* in that paragraph, which, as pointed

out in the *Hahn* case, *supra*, is tantamount to an allegation that its dutiable status is *not* to be ascertained by reference to the similitude clause.

The *Snellenburg* case, *supra*, is not *stare decisis* of the present issue.

The Government's contention is squarely supported by the *Hahn* case, *supra*, reaffirmed in the *Dearberg* case, *supra*, which, prior to the decision below, was the last word of an appellate court on this question. The *Dearberg* case was decided in 1905 and cleared up the uncertainty injected into the question by the interpretation placed by the board in the *Balbach* case, *supra* (in 1902), on the *Guggenheim* decision, *supra* (decided in 1901), and the refusal of a writ of certiorari in that case by this court.

Corpus Juris, vol. 17, p. 651 (sec. 252) says:

> *Reference to Similitude Clause.* The law is unsettled on the point that the similitude clause in the tariff should be cited in a protest relating to unenumerated goods which should have been classified in accordance with the provisions of that clause, *although the only authoritative decisions on the point hold that the clause must be cited.* [Italics ours.]

citing the *Hahn* case, *supra*, and pointing out that the *Dearberg* case, *supra*, reversed the holding of the board and the Circuit Court in the construction put by them upon the action of this court in denying the writ of certiorari in the *Guggenheim* case, *supra*.

Since the decision in the *Dearberg* case, *supra*, the tariff acts of 1909 and 1913 have been enacted in

which the similitude clause has been reenacted in the same language. This, we submit, constitutes a legislative approval and adoption of the principle laid down by the Circuit Court of Appeals, Second Circuit, in the *Hahn* case and reaffirmed in the *Dearberg* case.

The decision of the United States Court of Customs Appeals should be reversed, and the decision of the Board of United States General Appraisers affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

WM. W. HOPPIN,
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SAMUEL ISENSCHMID,
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Of Counsel.

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FILED
JUL 30 1898
JAMES H. MCKENNEY,
CLERK.

No. 117

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PETITIONER,

v.

M. TOCH & CO. AND J. G. NEDERHEIM.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT THEREOF.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES, PETITIONER,
v.
M. RICE & CO. AND J. G. NEIDINGER. } No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT THEREOF.

The United States prays for a writ of certiorari directed to the United States Court of Customs Appeals to bring before this court for review the decision and judgment rendered by the United States Court of Customs Appeals on the 1st day of May, 1920, in the case entitled "*M. Rice & Co. and J. G. Neidinger, appellants*, v. *The United States, appellee, No. 2017.*"

This petition is filed pursuant to section 195 of the Judicial Code, as amended, which reads (38 Stat. 703):

> SEC. 195. That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and

the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases: *Provided, however,* That in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall, before the decision of the Court of Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: *And provided further,* That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an act entitled "An Act to

provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an act entitled "An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," approved July twenty-sixth, nineteen hundred and eleven.

The Attorney General of the United States has duly filed a certificate that, in his opinion, this case "is of such importance as will render expedient its review by the Supreme Court of the United States."

The Court of Customs Appeals issued its mandate upon decision June 3, 1920.

THE ISSUE.

The single question involved in this case may be stated as follows: When by reason of the similitude clause of the tariff act of 1913 a nonenumerated article is dutiable at the same rate of duty which is levied on an enumerated article, is it essential to the validity of a statutory protest against the collector's assessment of duties that the protest refer to the similitude clause?

The merchandise involved herein consisted of dyed immortelles which the collector of customs at the port of Philadelphia assessed with duties under the provision in paragraph 347, tariff act of 1913 (38 Stat., 114, 148), which reads:

> * * * artificial and ornamental fruits grains, leaves, flowers, and stems or part

> thereof, of whatever material composed, not specially provided for in this section, 60 per centum ad valorem; * * *.

On the trial before the Board of United States General Appraisers it was stipulated that the merchandise was of the same character as that which was the subject of decision by the Court of Customs Appeals in *Bayersdorfer & Co.* v. *United States*, 7 Ct. Cust. Appls., 66. The merchandise in that case was described in the court's opinion as "natural flowers (immortelles) dried and dyed and wreaths composed of the same having a straw frame." Duty had been assessed thereon at 60 per centum ad valorem under said paragraph 347 as ornamental flowers, and as wreaths wholly or in chief value thereof. It was conceded that the immortelles were ornamental but not artificial. As the immortelles were not both artificial and ornamental, it was held that the merchandise was not dutiable as assessed. As to the proper classification, the court held that the flowers themselves were "dutiable *by similitude* under paragraph 210" of the tariff act of 1913, and that the wreaths "are also classifiable thereunder [i. e., under paragraph 210] *by force of paragraph 386*." [Italics ours.]

The instant importers protested against the collector's assessments, alleging that the merchandise was not dutiable as assessed, and making various claims as to the proper classification. The only claim

which needs to be noted now was that reading as follows:

> * * * it is properly dutiable at the rate of 25% ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh, * * *.

The cited provision in paragraph 210 of the tariff act of 1913 (38 Stat., 114, 133) reads as follows:

> Orchids, palms, azalea indica, and cut flowers, preserved or fresh, 25 per centum ad valorem; * * *.

As the protests did not invoke the similitude clause of the tariff act of 1913, the Government upon the trial contended that the protests did not claim the proper classification. The similitude clause is the first clause in paragraph 386 of the tariff act of 1913 (38 Stat., 114, 152), which reads as follows:

> *That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned;* and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resem-

> bles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

The Board of General Appraisers sustained the Government's contention and overruled the protests, one general appraiser dissenting (Abstract 43391, 37 Treas. Dec., 355). On appeal the Court of Customs Appeals stated the issue as follows:

> It is now conceded that the merchandise was erroneously assessed, and that it was dutiable at the rate of 25 per cent ad valorem *by similitude* with "cut flowers, preserved or fresh," as enumerated in the first clause of paragraph 210, being the clause cited in the protest.—*Bayersdorfer & Co.* v. *United States* (7 Ct. Cust. Appls., 66; T. D. 36390). The sole question in the present case therefore is whether the importers' failure to specify in the protests that they were claiming assessment

> under the first clause of paragraph 210 aforesaid, *by similitude* under paragraph 386 of the act as well as by direct enumeration, forbids a decision sustaining the protests under that clause by similitude. In other words, is it necessary that protestants shall specifically plead the similitude provisions in their protest in order to secure relief thereunder? [Italics copied.]

The court reversed the decision below and directed that the protests be sustained, one judge dissenting. (*Rice & Co. et al.* v. *United States*, 10 Ct. Cust. Appls. Vol.—; 38, p.—, T. D. 38403, decided May 1, 1920.)

The question involved is one of great practical importance to both the Government and importers. It is one as to which a difference of opinion exists among the judges of the Court of Customs Appeals. As more fully pointed out in the accompanying brief, the decisions of the Circuit Courts of Appeals have been conflicting, and the opinion of the majority in the court below was doubtless induced by the action of this court in denying an application for certiorari in a case arising under different provisions of law and in which the writ may well have been denied upon the ground that the question as thus presented was not of sufficient general importance.

It is respectfully submitted that a writ of certiorari should issue.

If an importer of merchandise be dissatisfied with the decision of the collector of customs as to the rate and amount of duties chargeable upon imported merchandise, he can file a "protest" against the collector's decision. That is an importer's sole remedy, as it has been since the present procedure was instituted by section 14 of the customs administrative act of 1890 (26 Stat., c. 407, 131, 137). While for a long time prior to the customs administrative act an importer instituted his appellate proceedings by a "protest," yet the "protest" of the present procedure is somewhat different from the "protest" of earlier statutes.

Under existing procedure an importer may, within a limited time, "file a protest or protests in writing with the collector, setting forth therein distinctly and specifically * * * the reasons for his objections" to the collector's decision. Upon the importer's complying with certain prescribed conditions, it becomes the collector's duty to "transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as provided by law." (Paragraph N, Section III, tariff act of 1913, 38 Stat., 114, 187.)

Under the authority conferred upon him by statute, the Secretary of the Treasury has directed that upon the filing of a protest the collector shall review his action on the entry, and, if satisfied that the claim

is valid, shall reliquidate the entry accordingly. The satisfying of a protest by the collector without awaiting a judicial determination has received judicial approval. *Gulbenkian* v. *Stranahan*, 158 Fed., 836, 838, and *United States* v. *Straus*, 5 Ct. Cust. Appls., 147, 149, are typical of many cases in which such action by the collector has been referred to with approval.

If the collector does not concede the claim of the protest, he transmits the record to the Board of General Appraisers. Before the board there are no pleadings. The case goes to trial on the issues raised by the protest.

As to the trial before the board, there are certain principles which are so firmly established that it would be superfluous to cite numerous authorities. There is a presumption that the collector's decision was right. (*United States* v. *Malhami*, 7 Ct. Cust. Appls., 175.) Upon the trial the protestant bears two burdens. He must first establish that the collector's decision was wrong, and he must prove that the claim of his protest is correct. For example, when the issue is as to the dutiable classification of imported merchandise, the protestant must affirmatively prove (1) that the collector's classification was erroneous and (2) that the classification claimed in his protest is correct. (*Benjamin Iron & Steel Co.* v. *United States*, 2 Ct. Cust. Appls., 159, 160.) A protest is insufficient if it fails to specify the true ground of objection to the

collector's exaction of duty. Stated in another way, in a proceeding to recover duties an importer is confined to the claims made in his protest; and even if he prove that the collector's classification was wrong, the importer will fail if his protest does not claim the right classification. *Benjamin Iron & Steel Co.* v. *United States*, 2 Ct. Cust. Appls., 159, 162; *United States* v. *Kuyper*, 6 Ct. Cust. Appls., 142; *Davies* v. *Arthur*, 7 Fed. Cas., p. 43, affirmed in *Davies* v. *Arthur*, 96 U. S., 148.)

The question in the instant case is whether the importers' protests claimed the right classification. The dyed immortelles had been assessed at 60 per centum under paragraph 347 as artificial and ornamental flowers. For the purposes of this case the Government concedes that the collector's assessment was erroneous. The protests claimed that the immortelles were "properly dutiable at the rate of 25% ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh." The first clause of paragraph 210 does make "palms * * * and cut flowers, preserved or fresh," dutiable at the rate of 25 per centum; but *dyed* immortelles do not fall within that classification.

Bayersdorfer v. *United States*, 7 Ct. Cust. Appls., 66, 72–73.

Bayersdorfer v. *United States*, 4 Ct. Cust. Appls., 446.

International Forwarding Co. v. *United States*, 4 Ct. Cust. Appls., 455.

United States v. *Bayersdorfer*, 175 Fed., 959.

However, the imported merchandise is not enumerated in the first section of the tariff act of 1913; and for the purposes of this case the Government concedes (*a*) that the imported merchandise is "similar, either in material, quality, texture, or the use to which it may be applied," to certain enumerated merchandise, to wit, "cut flowers, preserved or fresh"; and (*b*) that, therefore, by reason of the first clause of paragraph 386 the imported merchandise is properly dutiable at the rate of 25 per centum, which is "the same rate of duty which is levied on" said enumerated merchandise. As the protests do not refer to or claim the benefit of the similitude clause, the question is whether the protests made the right claim.

This precise question has been presented to judicial tribunals several times, with conflicting results. The question was passed upon squarely by the Circuit Court of Appeals, Second Circuit, in 1897, in *Hahn* v. *Erhardt* (78 Fed., 620). Upon the trial the importer had offered evidence to establish similitude. As the similitude clause of the tariff act then extant was not invoked by the protest, the Government objected that the protest was insufficient to authorize a recovery under the similitude clause. The objection was sustained and the importer appealed. In the course of its opinion the Circuit Court of Appeals gave full recognition to the principle that technical precision is not necessary in protests; and that it is sufficient if a protest notify the collector of the true nature and character

of the importer's objection to the collector's decision. The opinion continued:

> The similitude provision is intended to prescribe the duty to which articles are to be subjected that have been omitted in the enumeration of dutiable articles in the schedules of the tariff laws. It has no application when the imported article can be identified with any of those described in any of the schedules. If the importer asserts in his protest that his merchandise belongs to the category of enumerated articles, he asserts by implication that its dutiable character is not to be ascertained by reference to the similitude provision.
>
> * * * * *
>
> We conclude that in all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff schedules, and means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision, he should state the fact in his protest, and, if he fails to do so, his objection is not stated distinctly and specifically, within the meaning of the statute. It follows that the ruling in the court below was correct, and that the judgment should be affirmed.

The *Hahn* case was followed by the Board of General Appraisers in G. A. 4699 (T. D. 22161), decided in 1900.

In December, 1901, came the decision by the Circuit Court of Appeals, Third Circuit, in the case entitled "*In re Guggenheim Smelting Co.*" (112 Fed., 517). That decision covered three cases. The first case discussed in the court's opinion related to "base bullion" which had been assessed under paragraph 166 of the tariff act of 1894. The importer's protest claimed that the merchandise was properly dutiable under paragraph 165 of that act. The protest made no reference to the similitude clause, which was section 4 of that act. The briefs in that case were devoted to a discussion of the proper classification of the merchandise. They did not discuss the question as to whether the protest should have invoked the similitude clause. The court held that the merchandise was not dutiable under paragraph 166, and said that there was great difficulty, also, in applying the language of paragraph 165 to the merchandise. But by reading paragraph 165 in connection with the similitude clause and with section 21 (relating to smelting in bonded warehouses) the court felt "compelled to apply the so-called 'similar' provisions of section 4 to the importation." There was in the importer's brief a bare reference to sections 4 and 21, but, as has been said above, there was in the briefs no discussion of the question now here. But in principle the decision in the *Guggenheim* case gave the importer the benefit of the similitude clause, though it had not been invoked in the protest. However, although there is difficulty in seeing the connection between section 4 and section 21, yet a

reading of the court's opinion leaves the distinct impression that the decision would not have been as it was if the court had not read section 21 in connection with the similitude clause.

The Attorney General then applied to this court for a writ of certiorari in the *Guggenheim* case, pointing out the supposed conflict between the principle of that decision and the principle of the *Hahn* decision. The importer opposed the application, contending that the *Guggenheim* decision was in harmony with decisions of this court. The cases cited in the importer's brief do not seem to have passed upon the point of difference between the *Guggenheim* and *Hahn* decisions. The application for a writ was denied (186 U. S., 485). It is respectfully submitted that possibly this court did not regard the question of sufficient importance to warrant the granting of a writ.

The question came before the Board of General Appraisers in the *Balbach Smelting and Refining Co.* case, decided in July, 1902 (G. A. 5171, T. D. 23852). On the assumption that this court's denial of the application for a writ of certiorari in the *Guggenheim* case was tantamount to a disapproval of the doctrine announced in the *Hahn* case, the board held that it is not essential that an importer's protest specifically invoke the benefit of the similitude provision.

Then came *Dearberg's* case, decided by the Board of General Appraisers in March, 1904 (T. D. 25134, Abstract 775). From the fuller extract of the

board's opinion published in connection with *United States* v. *Dearberg*, T. D. 25782, it appears that the board's decision was made on the authority of the *Guggenheim* case. The board's decision was affirmed by the Circuit Court for the Southern District of New York, which said that the facts "seem to be precisely like those in the *Guggenheim* case." (*United States* v. *Dearberg*, 135 Fed., 245). On further appeal the question now under consideration was squarely presented to the Circuit Court of Appeals, Second Circuit. The reporter's statement of the case shows that the conflict between the *Hahn* and *Guggenheim* cases was pointed out to the court as well as the fact that the Government's application for a writ of certiorari in the *Guggenheim* case had been denied. The court reversed the Circuit Court, without opinion. (*United States* v. *Dearberg*, 143 Fed., 472.) It is manifest, therefore, that the Circuit Court of Appeals, Second Circuit, adhered to the principle of its decision in the *Hahn* case and that it did not approve the interpretation which the Board of General Appraisers and the Circuit Court had put upon the action of this court in denying the Government's application for a writ of certiorari in the *Guggenheim* case.

The question was again before the Board of General Appraisers in 1906, when the board followed the last *Dearberg* decision, one general appraiser dissenting (G. A. 6327, T. D. 27252).

In a case decided in December, 1909, the Board of General Appraisers refused to apply the similitude

clause where it had not been invoked by the importer's protest (G. A. 6959, T. D. 30223). In its opinion the board said:

> The objection to the application of the similitude clause is supported by a long line of decisions both by the Board and the courts and is unquestionably sound; * * *.

In a case decided by the Board of General Appraisers in May, 1917, the sole issue presented was the question whether the similitude clause must be pleaded in a protest in order to support an importer's contention for classification by reason of that provision. The board decided that the similitude clause must be pleaded. (G. A. 8062, T. D. 37177.) In its opinion the board said:

> While there is some conflict of authority as to the necessity of pleading the similitude provisions of paragraph 386, we think the better current of authorities holds that the protestant to avail himself of this provision of the law must make that claim specifically in his protest.

We may make the following summary of the cases involving the present question: In the *Hahn* case the Circuit Court of Appeals, Second Circuit, after full consideration of the question, held that the similitude clause must be pleaded. Without referring to the question in its opinion in the *Guggenheim* case, the Circuit Court of Appeals, Third Circuit, rendered a decision which can be construed as holding that an importer may have the benefit of the similitude clause

though he has not pleaded it. In the *Guggenheim* case this court refused to grant a writ of certiorari after its attention was called to the conflict, but it does not follow that this court intended thereby to disapprove the principle of the *Hahn* case. In the *Balbach* case the Board of General Appraisers construed the denial of a writ in the *Guggenheim* case as a disapproval of the *Hahn* case. In the *Dearberg* case the Board of General Appraisers and the Circuit Court put the same construction upon this court's refusal to grant a writ, but the Circuit Court of Appeals, Second Circuit, reversed and stood by the position it had taken in the *Hahn* case. In three later cases the Board of General Appraisers carefully considered the conflicting decisions, but in each case ruled that the similitude clause must be pleaded.

The Court of Customs Appeals said in its opinion in the instant case:

> It must be conceded that each side of the present controversy admits of very persuasive arguments in its behalf, and doubtless because of this fact the decisions of the board and the courts upon the question have been far from uniform.

And also—

> In respect to the controlling decisions of the board and the courts upon the specific question now in hand, there has been great contrariety, and it is almost doubtful whether either view has received a clear preponderance of authority.

Without deciding which of the two conflicting lines of decisions is of the greater authority, the Court of Customs Appeals felt it was controlled by the principle of its decision in *United States* v. *Snellenburg*. (9 Ct. Cust. Appls., 59; T. D. 37939.) In that case there was a question as to the sufficiency of a protest which did not invoke paragraph 303 of the tariff act of 1913. (38 Stat., 114, 143.) In its opinion in the instant case the court referred to that paragraph as "virtually a similitude clause." If it is, surely, as the opinion says, it is of "limited application." If it is in the nature of a similitude clause of limited application, surely that paragraph lacks some of the main characteristics of the general similitude clause in paragraph 386. Further, the broad question under paragraph 386 presented in this case was not involved in the *Snellenburg* case; and the briefs in that case made no reference whatever to the conflicting decisions to which reference has been made herein. Full acceptance of the principle involved in the decision of the narrow question in the *Snellenburg* case does not carry with it conviction that the principle of the *Hahn* case was wrong.

The question involved in the *Snellenburg* case was so narrow that there was not even a suggestion that the Attorney General certify that the case was of such importance as to render expedient its review by this court.

Though the Court of Customs Appeals felt constrained to follow what it regarded as the principle of its decision in the *Snellenburg* case, yet its opinion

in the instant case indicates the line of cleavage between those who, on the one hand, contend that to get the benefit of the similitude clause an importer must plead it in his protest and those who, on the other hand, contend that it is not necessary to plead the similitude clause. The court said:

> It is true, strictly speaking, that the similitude paragraph is itself in a sense an assessing paragraph, but it may fairly be said that in the general language and common understanding of those dealing with the subject, and indeed in the language of many court decisions as well, merchandise which becomes dutiable at a given rate by similitude with enumerated articles is regarded as being brought thereby within the enumerating paragraph for assessment, and it is no stretch of construction to require that the language of a protest should be interpreted with this common form of expression in view.

In addition to indicating the line of cleavage between the two lines of thought, that excerpt also made a statement as to an alleged "common understanding." We respectfully challenge the assertion that there is a "common understanding" that "merchandise which becomes dutiable at a given rate by similitude with enumerated articles is regarded as being brought thereby within the enumerating paragraph for assessment." While the "language of many court decisions" is as stated, yet we have already pointed out the conflict of court decisions.

As already said, the excerpt from the court's opinion indicates the line of cleavage. Is the similitude clause itself a duty-levying provision, or does it merely serve to broaden the scope of other paragraphs which are themselves duty-levying? If it is not a duty-levying provision and its sole effect is to broaden the scope of other paragraphs, then it might follow that it is not necessary for a protest to invoke the similitude clause. But on behalf of the Government it is asserted that that is not the effect of the similitude clause.

For a consideration of the problem an analysis of the first section of the tariff act of 1913 will be found helpful. The preamble of the act provides that, except as otherwise especially provided for in the act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of the first section. The first section of the act is made up of two parts which Congress designated as the "dutiable list" and the "free list." Each list is composed of numbered paragraphs. The paragraphs of the "dutiable list" are numbered from 1 to 386, inclusive; and those of the free list from 387 to 657, inclusive. (38 Stat., 114–166.)

Each paragraph of the free list enumerates articles which are exempt from duty. The first 384 paragraphs of the dutiable list deal with enumerated articles, all but about ten of those paragraphs being duty-levying paragraphs. Then come the final catch-

all paragraphs of the dutiable list, viz., paragraphs 385 and 386.

None will deny that paragraph 385 is a duty-levying paragraph. It definitely fixes the rates of duty for certain classes of articles which are not enumerated or otherwise provided for in the first section of the tariff act. But paragraph 385 is not applicable until both the first 384 paragraphs and also paragraph 386 have been exhausted. If an imported article is not provided for in the free list or in the first 384 paragraphs of the dutiable list, the inquiry is as to whether it is provided for in paragraph 386. Not until that paragraph has been exhausted can resort be had to paragraph 385. (*Hahn* v. *United States*, 100 Fed., 635.) That brings us to an analysis of paragraph 386.

Paragraph 386 (which has been copied on an earlier page hereof) contains four distinct provisions. The similitude clause and two other provisions in the first sentence. Each provision prescribes the rates of duty leviable on certain imported articles not elsewhere enumerated in the first section. Though these provisions do not themselves specify the rates applicable, yet these provisions themselves determine the rates. Though other paragraphs of the dutiable list have to be read in connection with the similitude clause, yet it is the similitude clause itself which fixes the rate applicable to a nonenumerated article which falls within its terms. The similitude clause levies the duty.

Hence it follows that if an importer contends that his merchandise is not dutiable as assessed by the collector, but is dutiable under the similitude clause, he should so state in his protest.

Whether a given article is "similar, either in material, quality, texture, or the use to which it may be applied," to any enumerated dutiable article is a question of fact. Such question of fact may be and often is difficult of determination, and may depend upon evidence which is obscure and not apparent without investigation. The protesting importer should indicate his contention (*a*) to the end that the collector may know what that contention is, and (*b*) to the end that upon the trial before the Board of General Appraisers the Government may know what issue it has to meet.

In the case at bar the protests claim that the imported merchandise was dutiable "as palms or cut flowers preserved or fresh." Thereby the importers asserted that their merchandise fell directly within the category of articles enumerated in paragraph 210. As the court said in *Hahn* v. *Erhardt* (78 Fed., 620, 621):

> If the importer asserts in his protest that his merchandise belongs to the category of enumerated articles, he asserts by implication that its dutiable character is not to be ascertained by reference to the similitude provision.

Because of earlier decisions the collector knew that dyed immortelles were not "cut flowers, preserved or fresh"; and that consequently they were not dutiable

under paragraph 210. The protests did not indicate that the importers contended that the dyed immortelles were "similar," within the meaning of paragraph 386, to "cut flowers, preserved or fresh."

In this connection it is well to point out that the decision that dyed immortelles are dutiable by similitude at the rate prescribed in paragraph 210 was made May 1, 1916. (*Bayersdorfer* v. *United States*, 7 Ct. Cust. Appls., 66.) One of the instant protests (viz., 852149) was filed on April 16, 1916, which was before the *Bayersdorfer* decision. The other (viz., 852150) was filed July 7, 1916, a short time after that decision. To say the least, it is possible that when filing the protests the importers had it in mind that dyed immortelles were in fact "cut flowers, preserved or fresh," and consequently were specifically covered by paragraph 210. Such a contention has been made many times. It was made in *Bayersdorfer* v. *United States* (4 Ct. Cust. Appls., 446) and in *International Forwarding Co.* v. *United States* (4 Ct. Cust. Appls., 455), which were decided in 1913. In that *Bayersdorfer* case there was uncontradicted evidence that for a long period dyed immortelles had been assessed under provisions for natural flowers "preserved or fresh" and cut flowers "preserved or fresh"; and the importer argued for an application of the rule of long-continued administrative practice followed by legislative adoption. Despite those earlier decisions the contention was renewed by the same Bayersdorfer & Co. in their protest which was decided May 1, 1916. (7 Ct. Cust.

Appls., 66). That same claim may well have been what the instant importers had in mind at the time they protested, their claim under the similitude clause arising only after the publication of the last *Bayersdorfer* decision.

The question involved in the case at bar is of consequence. It is of importance to importers that they know how specific their protests must be in order to litigate their differences with the Government. It is important to the Government to know what litigable issues are raised by protests.

Looking back over the litigation upon the vital question in the case at bar, it is apparent that the differences of opinion largely turn upon the construction which should be given to this court's denial of a writ in the *Guggenheim* case in 1902. The controversy could be definitely and finally settled by this court's ordering up and deciding the instant case.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

BERT HANSON,
Assistant Attorney General.

JULY, 1920.

○

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 114.

THE UNITED STATES,
Petitioner,

vs.

M. RICE & CO. and J. G. NEIDINGER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR RESPONDENTS.

COMSTOCK & WASHBURN,
Attorneys for Respondents.

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PRESS OF FREMONT PAYNE, Inc., 80 Washington St., New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921. No. 114.

THE UNITED STATES,
Petitioner,
vs.
M. RICE & COMPANY and J. G. NEIDINGER,
Respondents.

BRIEF FOR RESPONDENTS.

This suit was brought before the court of customs claims, known as the Board of General Appraisers, claiming refund of duty alleged to have been illegally exacted by the Collector of Customs at Philadelphia. After trial at nisi prius on the Philadelphia docket, the Board, Brown, G. A., dissenting, gave judgment for the Government. (Record, page 20; unpublished Board abstract 43391.)

Upon appeal by the importer to the Court of Customs Appeals that Court reversed the Board, Judge Barber dissenting (Record, pages 22-27), and rendered judgment for the importers (Record, pages 27-28; 10 Ct. Cust. Appls., 165, T. D. 38403).

The Government now brings the case to this Court by certiorari.

The merchandise consists of immortelles of the same character as those which were the subject of decision by the Court of Customs Appeals in *Bayersdorfer* vs. *United States*, 7 Ct. Cust. Appls., 66, T. D. 36390, May 1, 1916, therein held to be dutiable at 25 per cent. ad valorem under paragraph 210 of the Tariff Act of 1913 as cut flowers, preserved or fresh, by similitude; and that was the holding of the Court of Customs Appeals in the case at bar (opinion by Judge Martin). (Record, pages 22-27; 27-28.)

The Philadelphia Collector levied duty upon the goods at 60 per cent. ad valorem under paragraph 347 of the Tariff Act of 1913 as "artificial and ornamental flowers." The protests claimed the immortelles dutiable "at the rate of 25 per cent. ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh" (Record, pages 4, 9); but made no specific mention of paragraph 386 or of the similitude clause.

The paragraphs of the 1913 Act which the Court may wish to consider, in so far as material, read as follows:

> "347. * * * artificial and ornamental fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, 60 per centum ad valorem; * * *.
>
> "210. Orchids, palms, azelea indica, and cut flowers, preserved or fresh, 25 per centum ad valorem; * * *."

And paragraph 386 of the Act of October 3, 1913 (which corresponds in its general terms to all of the following earlier statutory provisions, namely,

Section 20 of the Act of 1842, Section 2499 of the United States Revised Statutes which was incorporated as part of the Tariff Act of March 3, 1883, Section 5 of the Act of October 1, 1890, Section 4 of the Act of September 28, 1894, Section 7 of the Act of July 24, 1897, and paragraph 481 of the Act of August 5, 1909), reads as follows:

> "386. That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two

> or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates."

It is now settled law that such merchandise is properly dutiable at only 25 per cent. ad valorem under paragraph 210 (7 Ct. Cust. Appls., page 74); but the question is whether the protests are sufficient to warrant this Court in so deciding the case that the importers will receive the duty relate to which they are entitled.

A general question is here involved, namely, whether the importers' pleading in customs law suits against the Government (which concededly cannot be amended like pleadings in nearly all other suits in municipal, state or federal courts) is hereafter to be interpreted liberally in favor of the taxpayer, or strictly in favor of the Government; but no very important principle or "vital question" is here at stake; at least it is no more important now than it was in 1902 when this Court denied the Government's application for a writ of certiorari in the Guggenheim case (186 U. S., 485).

The purport of the claim of the Government, and its attitude toward the importer as expressed by our opponent, appears to be this:

The United States Government has exacted and collected from you 35 per cent. more duties than it is entitled to under the statute; but it does not propose to refund or pay that amount back to you because you failed to word your pleading with the technical nicety which we believe the law requires.

ARGUMENT.

I.

These protests are sufficient.

We agree with counsel for the United States that the essential or fundamental purpose of a protest is to point out to the Collector distinctly and specifically the importer's reasons for objection to his classification and duty assessment so that the Collector can consider the question and if he sees fit amend his original decision and reliquidate either free of duty or at the lower rate claimed by the importers.

Heinze vs. *Arthur's Executors*, 111 U. S., 28,

Schell's Executors vs. *Fauché*, 138 U. S., 562.

Our real dispute with opposing counsel arises *in regard to the application of that rule to the particular facts in the present case.*

The protests claimed the merchandise dutiable "at the rate of 25 per cent. ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh" (Record, pages 1, 9).

The importers, M. Rice & Co. and J. G. Neidinger, in their suits against the Government pleaded in their protests the correct description of the merchandise, the correct paragraph, the correct rate of duty, the correct statutory language above quoted, also the correct entry number, name of vessel, date of entry and date of liquidation (Record, pages 4, 9).

That the collector was not in any way misled is indicated not only by his reports (Record, pages 5, 10) but also by the reports of the Appraiser

(Record, pages 5-6, 11). The Appraiser's report on Neidinger's protest 852149/62402 reads:

"Answer to protest.

June 5, 1916.

In the matter of protest No. 62402, entry No. 14249, J. G. Neidinger, immortelles, S. S. Ile de la Reunion.

THE COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

Sir:

I return herewith papers covered by the above protest with the information that the merchandise in question consisted of natural and dyed immortelles which in view of T. D. 36390, would now be classified and returned as dutiable at 25 per cent. ad valorem under paragraph 210 of the tariff act of 1913, for which reason the said protest should be sustained.

Respectfully,

J. K. FORNACE,
Ass't. Appraiser."

A report similar to the one above quoted was made with reference to protest 852150/62879 of M. Rice & Co. (Record, pages 5-6). It is also evident from the correspondence which passed between the Philadelphia Collector and the Secretary of the Treasury in April 1918 prior to the date June 24, 1918, when the Collector made his returns to the Board of General Appraisers (Record, pages 5, 10), that the Collector was fairly well apprised of the importer's claim and that both he and the Secretary of the Treasury gave

careful consideration to the question whether the protests should be sustained in accordance with the appraiser's recommendation, or whether he should allow his admittedly erroneous 60 per cent. assessment to stand (See Record, pages 6 to 8 inclusive).

The Collector's attention was directed to the proper rate, the proper provision, to wit, "cut flowers preserved or fresh" which covered these immortelles; and it was thereafter incumbent upon him to determine *whether they were so dutiable either directly, or by similitude, or by virtue of commercial designation*, or by reason of component *material of chief value* or under any of the other well-known rules of construction, with which as an executive and classifying officer of the Government, he would naturally be familiar. Indeed it is a close question whether these immortelles are not specifically and directly provided for under paragraph 210 as "cut flowers preserved or fresh." The Collector, by these protests, was clearly apprised of the fact that the importers were objecting to his classification of these immortelles at the 60 per cent. rate under paragraph 347, and that they were contending that they should be taxed only at the 25 per cent. rate under paragraph 210.

Indeed it appears from the record that in accordance with the terms of subsection N of Section III of the Tariff Act of 1913, "*the decision of the collector* as to the rate and amount of duties chargeable upon (this) imported merchandise," (as distinguished from the perhaps unwarranted decision of the *Secretary of the Treasury* in the premises) was in favor of the importers, because in his letter to the Secretary of the Treasury dated April 17, 1918, the Philadelphia Collector said that his office was "inclined to recommend that

relief be granted by the department, particularly as above stated, a proper claim was made in the protests as to the actual paragraph under which duties should be assessed and the rate thereof." (Record, page 7.)

No claim or allegation is made in the protests that the immortelles are *enumerated* in paragraph 210, as our learned opponent seems to infer in several places in his brief. On the contrary, the precise language of each protest is that the merchandise, immortelles, "is properly dutiable at the rate of 25 per cent. ad valorem under the first clause of paragraph 210 as palms or cut flowers preserved or fresh;" and as we show by our argument under Point II, they *are* so dutiable, either directly, or by virtue of the common ordinary understanding of the statutory terms, or by virtue of commercial designation, or by similitude.

In the case of *Bayersdorfer* vs. *United States*, Suit 1669, 7 Ct. Cust. Appls., 66, T. D., 36390, which involved merchandise of the same kind as that involved in the case at bar, and the record in which was incorporated as a part of the record in the present case by consent (Record, pages 11-12), the Court of Customs Appeals *did not hold*, as the Assistant Attorney General states on pages 2 and 19 of his brief, that immortelles were "dutiable by similitude *under paragraph* 386 at the same rate of duty as is prescribed for preserved cut flowers in said paragraph 210." On the contrary, the Court held in the Bayersdorfer case that immortelles were dutiable by similitude at 25 per cent. ad valorem *under paragraph* 210 as cut flowers preserved or fresh.

In substantiation of ~~the company of~~ the accuracy of our statement, we respectfully refer to the opinion of the Court (7 Ct. Cust. Appls., page 74);

and we quote also the judgment order of the Court of Customs Appeals in the Bayersdorfer case, which reads as follows:

"United States Court of Customs Appeals. At a session of said Court continued and held at the City of Washington, pursuant to adjournment, on this 1st day of May, A. D., 1916.

H. Bayersdorfer & Co., Appellant.	
vs.	No. 1669.
The United States, Appellee.	

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is

Ordered that the decision of the Board of United States General Appraisers be, and the same is hereby, reversed, and the merchandise covered by said appeal is held to be dutiable at 25 per centum ad valorem by similitude as cut flowers, preserved or fresh, under paragraph 210 of the tariff act of 1913; and said appeal is remanded to said Board for proper action in the premises.

(Sgd.) ROBERT M. MONTGOMERY,
Presiding Judge."

Thereafter, on June 14, 1916, a "judgment order" was duly entered by the Board of United States General Appraisers quoting the terms of the

mandate order of the Court as above stated and directing the Collector to reliquidate the entries accordingly.

Indeed, at the time of trial in the present case counsel for the Government specifically, and quite correctly, admitted that the Bayersdorfer decision held the merchandise "to be dutiable at 25 per cent. under paragraph 210 by similitude." (Record, page 12.)

Counsel for the Government say, at page 19 of their brief:

> "We contend that the *Bayersdorfer* case held them (immortelles) to be dutiable under the similitude clause at 'the same rate of duty which is levied on' preserved cut flowers in paragraph 210; hence, the similitude clause is obviously something more than a rule of construction."

We submit that both the premises and the conclusion which our opponents draw therefrom are unwarranted, and that a more accurate statement would be:

> "The Bayersdorfer case held them (immortelles) to be dutiable at the rate of 25 per cent. under paragraph 210, as cut flowers preserved or fresh by similitude, the court impliedly at least interpreting the similitude clause in line with the decision of the Supreme Court in *Stuart* vs. *Maxwell* and also in accord with long continued administrative practice as a rule of denomination or construction."

II.

The weight of authority supports the view that the so-called similitude, higher rate of duty and mixed material provisions of Section 2499 of the Revised Statutes and the similarly worded sections in other tariff laws from 1842 to date, were designed to prevent possible evasions of duty and to furnish rules for classifying non-enumerated articles under whatever enumerations in the dutiable schedule were found to be most closely applicable; and the technical view now urged by the Government that they must each and all be specially and severally pleaded in order to be availed of is not sound, where an importer, as in this case, points out the essential provision of the Tariff Law which practically describes the merchandise and controls its classification. And as the similitude and component material of chief value clauses thus judicially construed in the following cases have been repeatedly re-enacted by Congress, and as they have for more than sixty years been uniformly applied in executive administrative practice according to the views expressed in Stuart vs. Maxwell, 16 How., 150, the very strongest reasons are presented why the rules of "long continued practice" and "judicial construction followed by legislative enactment" should be enforced in the case at bar.

Stuart vs. *Maxwell*, 16 How., 150;
Cohen vs. *Phelps*, 6 Fed. Cas., 17; Case No. 2964;
Morlot vs. *Lawrence*, 1 Blatchf., 608, 17 Fed. Cas., 770, Case No. 9815;
Aloe vs. *Churchill*, 44 Fed., 50, 51;
Fisk vs. *Arthur*, 103 U. S., 431;
Arthur vs. *Fox*, 108 U. S., 125;
Liebenroth vs. *Robertson*, 144 U. S., 35;
Pickhardt vs. *Merritt*, 132 U. S., 252;
Herrman vs. *Arthur*, 127 U. S., 363;
Wakem vs. *United States* (CC), 180 Fed., 1021, affirming T. D. 25172, G. A. 5633;
Rosenstern vs. *United States* (CCA), 171 Fed., 71, 96 C. C. A., 175;
Vandegrift vs. *United States*, 9 Ct. Cust. Appls., pages 119-120, T. D. 37978;
Gamble vs. *Mason*, 7 Am. Law Reg., 178; 9 Fed. Case ,1140; Case No. 5209;
Field vs. *Schell*, 5 Blatchf., 1; 9 Fed. Cas., 24; Case No. 4772;
United States vs. *Manassee* (C. C. A.), 56 Fed., 828;
Ross vs. *Peaslee*, 2 Curt., 499; 20 Fed. Cas., 1241; Case No. 12077.

Stuart vs. *Maxwell*, 16 How., 150, decided in 1853, which is the initial important case on this subject, wherein the court carefully considered the meaning, force, and effect of the so-called similitude clause, has never been overruled or modified; but on the contrary has since been cited and followed in numerous decisions by this Court, by the Court of Customs Appeals in *Vandegrift* vs. *United States*, 9 Ct. Cust. Appls., 112, 119-120, T. D. 37978, the Circuit Court of Appeals, the Circuit Courts and by the Board of General Appraisers.

In the Stuart case the Court held that certain manufactures of linen and cotton were dutiable as assessed under Schedule D of the Tariff Act of July 30, 1846, as "manufactures composed wholly of cotton not otherwise provided for" by virtue of the similitude provision contained in Section 20 of the Act of August 30, 1842, taking the view that Section 20 (*which is the prototype of Paragraph 386 of the Tariff Act of 1913 now under consideration*) furnished a rule of denomination in full force and effect and applicable to the Tariff Act of 1846 although it was in terms related to the Act of 1842. The Court said:

> "The Act of 1846 is a revenue law of the United States, and must be construed with reference to acts in *pari materia*, of which it forms only one part. This observance of a settled principle for the construction of statutes is absolutely necessary in the present state of Legislation of Congress on the subject of revenue. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur. We are obliged to look at the whole existing system, and consider the nature of the subject-matter of the enactment under consideration, in its relations to that system, in order to pronounce with safety upon its repugnancy to, or consistency with, any particular act of Congress.
>
> In the first place, then, it must be observed, that the 20th section of the Act of 1842 (which is the prototype of Paragraph 386 of the present law) *does not impose any particular rate of duty upon imports. It was designed to afford rules to guide those employed in the col-*

lection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent, and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same rules, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by Legislation to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted.

It does not seem to be any more repugnant to the provisions of the act of 1846 than the great number and variety of provisions of the revenue laws, whose object was to cause the revenue to be regularly and uniformly collected without evasion or escape. If this act of 1846 had in terms enacted the 20th section of the Act of 1842, its provisions would not thereby have been rendered repugnant or conflicting. *This section would then only have afforded a rule by which it could be determined that certain articles did substantially belong to and were to be reckoned as coming under a particular schedule .* * * *

By providing for the principal thing, it (the Act of 1846) *has provided for all other things which the law declares to be the same.* It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take

the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. *The law of* 1842 *then declares that it is to be deemed the same, and to be charged accordingly; that the act of* 1846 *has provided for it under the name of what it resembles.* * * * The true interpretation we consider to be this: the 26th Section of the act of 1842 having re-enacted the then existing laws, and applied them to the collection of duties levied by that act, when Congress, by the Act of 1846, merely changed the rates of duty, without legislating concerning their collection, the laws in force on that subject are to be applied; and this application is not restrained by the fact, that, when re-enacted by the Act of 1842, they were declared to be so for the purpose of collecting the duties by that act imposed. The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were acted on; *and among these existing laws is that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked; when this has been determined, the Act of* 1846 *levies the duty.*" (Italics ours.)

16 How., pages 160-163.

In *Arthur* vs. *Fox*, 108 U. S., 125, Mr. Chief Justice Waite delivering the opinion of this Court,

referred to and quoted at considerable length from the ruling in *Stuart* vs. *Maxwell*, 16 How., 150, and then went on to say:

> "If an article is found not enumerated in the tariff laws, then the first inquiry is whether it 'bears a similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated * * * as chargeable as with duty.' If it does, and the similitude is substantial, then, in the language of the Court in *Stuart* vs. *Maxwell*, supra, 'it is to be deemed the same, and to be charged accordingly.' In other words, although not specifically enumerated, *it is provided for under the name of the article it most resembles.* If nothing is found to which it bears the requisite similitude, then an inquiry is to be instituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. Any other construction would leave the law open to evasions, *which*, as was also said in *Stuart* vs. *Maxwell*, *it was the object of this statute, enacted more than forty years ago and kept continually in force since, to prevent.*" (Italics ours.)
>
> 108 U. S., pages 128-129.

Concerning the case of *Aloe* vs. *Churchill*, 44 Fed. Rep., 50, decided in 1890 by Judge Thayer in the Circuit Court for the Eastern District of Missouri, which the Assistant Attorney General refers to on page 20 of his brief, we respectfully submit that the single portion of Judge Thayer's opinion which Mr. Hoppin quotes, setting forth merely Heyl's Digest erroneous interpretation of the holding of this Court in *Arthur* vs. *Fox*, 108 U. S., 128,

is misleading as to the holdings of the Court in *Arthur* vs. *Fox*, and of Judge Thayer in the Aloe case, because the portion of his opinion immediately preceding the reference to Heyl's Digest interpretation of *Arthur* vs. *Fox* reads as follows:

> "Plaintiffs' chief contention is that opera glasses are 'specially provided for' under the third clause of Section 2499, and, as the last clause of the metal schedule only applies to articles 'not specially enumerated or provided for,' that they are not dutiable thereunder. The vice of the argument is that it assumes the very point in controversy; that is to say, it assumes that opera glasses are 'specially provided for' by Section 2499. The fact is that Section 2499 does not specifically enumerate any article. That section was first enacted on August 30, 1842, and, with some modifications, *has ever since continued in force*. It was early held, in *Stuart* vs. *Maxwell*, 16 How., 151, that the purpose of that section was to afford a rule of construction for the tariff laws. It does not impose duties on specific articles, but enunciates a rule by which duties may be assessed when articles for any reason cannot be fairly assessed under any provision of the schedules."
>
> 44 Fed. Rep., pages 50-51.

The decision of Judge Thayer in the *Aloe* case was expressly approved by this Court in 1894 in *Seeberger* vs. *Schlesinger*, 152 U. S., 581, at page 589.

In connection with *Biddle* vs. *Hartranft* (CC), 29 Fed., 90, which government counsel cites on

pages 20-21 of his brief, it may be noted that Judge Butler, who joined with Judge McKennan in deciding the case, took a view somewhat different from Judge McKennan and more in harmony with the ruling of this Court in *Stuart* vs. *Maxwell*. He said:

> "BUTLER, J. When the case was called for trial I was very much impressed with the reference made by the counsel for the plaintiffs to the provision of the act of Congress upon which he based his argument, viz., a provision subjecting all salts to a specific duty. When, however, that provision is clearly examined, it will be observed that it refers only to articles enumerated not before provided for. What was before provided for? First, bichromate of potash is provided for at three cents per pound. *Therefore it appears that bichromate of soda, although not enumerated, is specifically provided for when provision is made in the act of Congress for bichromate of potash*, and when it is ascertained that bichromate of soda is in the similitude of bichromate of potash."
>
> 29 Fed. Rep., page 91.

Fisk vs. *Arthur*, 103 U. S., 431, is another case in point. There the Court held, opinion by Mr. Chief Justice Waite, that certain shirtings made substantially of cotton but composed in part of linen were dutiable by similitude as "manufactures of cotton," quoting with approval from *Stuart* vs. *Maxwell*, 16 How., 150, as follows:

> "'By providing for the principal thing, it has provided for all other things which the law

> declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling or colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it is to be deemed the same and to be charged accordingly.' The effect of this is to hold that such an article 'is provided for under the name of what it resembles.'" (103 U. S., pages 433-434).

In *Pickhardt* vs. *Merritt*, 132 U. S., 252, the holding was that certain dyes or colors were liable to duty as assessed by the Collector *under the provision in Schedule M, Section* 2504 of the Revised Statutes, 2nd ed., page 479, for "aniline dyes and colors by whatever name known" if when imported they would be included by commercial understanding in the class of articles known as aniline dyes, or if under Section 2499 of the Revised Statutes (a provision corresponding in terms to paragraph 386 of the Tariff Act of 1913) they were similar to aniline dyes in material, quality or use to which they might be applied.

In *Herrman* vs. *Arthur*, 127 U. S., 363, the Collector had classified certain goods made from calf hair and cotton under the provision for "woolen cloths and manufactures of wool" directly and without resort to the similitude clause, yet, upon trial, he was allowed "to introduce evidence tending to prove that if not so dutiable directly they were

dutiable under that provision by similitude, and this Court approved of that practice. Mr. Justice Blatchford, delivering the opinion of the Court, said:

> "The plaintiffs objected and excepted to the introduction of the testimony as to similitude offered by the defendant, on the ground that it was incompetent, irrelevant, and immaterial, and on the further ground that, the defendant having based his assessment on the view that the goods contained wool, could not now be permitted to justify the assessment on any other ground. But we think that this objection was properly overruled. The suit was brought for an illegal exaction of duties, and, if the law in force at the time, properly interpreted, justified the exaction of the duties imposed, it was competent for the defendant to show it at the trial."
>
> 127 U. S., pages 367-368.

The Court then proceeded to distinguish this case from *Arthur* vs. *Fox*, 108 U. S., 125, wherein the Collector's assessment of certain high-grade velour made of cow or calf hair, vegetable fiber and cotton under the tariff provision for manufactures of goats' hair and cotton, the article it most resembled, was upheld, pointing out that in the Herrman case the goods were of much lower value and poorer quality than the mohair goods under the provision for which the Collector was trying to have them classified by similitude.

Liebenroth vs. *Robertson*, 144 U. S., 35, involved an importation of photographic albums composed of paper, leather and metal, paper chief value, for which there was no specific provision in the Tariff

Act of 1883. The Collector had classified them under the provision for manufactures of leather, but this Court held, citing *Mason* vs. *Robertson*; *Stuart* vs. *Maxwell*, and *Fisk* vs. *Arthur*, that that was erroneous, and that by virtue of the mixed material clause contained in Section 2499 of the Revised Statutes as amended by Section 6 of the Act of 1883, they should have been classified and assessed for duty under the tariff provision for manufactures of paper. The Court said:

> "The reasons assigned by the Circuit Court for directing a verdict for the defendant are reported in 33 Fed. Rep., 457; and it would appear from them that the court gave no effect to the later provision in Section 2499, as enacted by the act of March 3, 1883, that 'on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable.'
>
> These albums were articles manufactured from materials two of which were paper and leather; and, as the evidence distinctly showed that the paper was the component material of chief value, the duty was assessable under Schedule M of the act of 1883, at 15 per cent., under the clause imposing that duty on paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act."
>
> 114 U. S., page 39.

For a continuous period of 68 years ever since the rule was laid down by this Court in 1853 in *Stuart* vs. *Maxwell* concerning the purpose and force of the similitude clause, not only the Board

of United States General Appraisers, but also the Treasury Department, the United States Circuit Court, the United States Circuit Courts of Appeals for the various circuits throughout the country, the United States Court of Customs Appeals, and this Court have repeatedly, and we may say without passing the bounds of accuracy, in at least hundreds of cases, held non-enumerated merchandise classifiable under certain paragraphs of the dutiable schedules by virtue of the similitude clause, that is, by reason of its similarity to the enumerated article either in material, quality, texture or use. These decisions, wherein the holdings have been to that effect are altogether too numerous to mention in detail; but the following may be cited as rulings in point:

(A) By the Supreme Court:

United States vs. *Downing*, 201 U. S., 354, T. D., 27281;
Komada vs. *United States*, 215 U. S., 392;
Wills vs. *Russell*, 100 U. S., 621, 628, 629;
United States vs. *Tiffany*, 218 U. S., 675;

Mr. Justice Hughes, delivering the opinion of this Court in *United States* vs. *Citroen*, 223 U. S., 407, at page 422, tersely outlined the history of the litigation in the Tiffany case, *supra*, as follows:

> "On the authority of the decision of the Circuit Court of Appeals in Citroen's case, the Board of General Appraisers sustained the importer's protest, holding that the pearls were dutiable either directly or by similitude at ten per cent. under paragraph 436. T. D., 29542, G.

A. 6864. This was sustained by the Circuit Court (*United States* vs. *Tiffany & Company*, 172 Fed. Rep., 300), and its decision was affirmed by the Circuit Court of Appeals, 101 C. C. A. (2d Cir.), 665; 178 Fed. Rep., 1006. Petition for writ of certiorari was denied by this court. 218 U. S., 675."

223 U. S., page 422.

Earlier in the same opinion in the Citroen case, the Court said:

"The questions presented are (1) whether the pearls fall directly within the description of the paragraph (434) relating to jewelry, and, (2) if not, whether they are brought within this paragraph through similitude, by virtue of Section 7, 30 Stat., 205."

223 U. S., page 414.

And again, at page 416:

"Second. Although the pearls do not fall directly within paragraph 434, the question remains whether they are brought within it by similitude."

223 U. S., page 416.

(B) By the Court of Customs Appeals:

Strohmeyer vs. *United States*, 3 Ct. Cust. Appls., 399, T. D. 32987;
Strauss vs. *United States*, 2 Ct. Cust. Appls., 202, T. D. 31946;

Robins vs. *United States*, 1 Ct. Cust. Appls. 252, T. D. 31278;
Gross vs. *United States*, 1 Ct. Cust. Appls., 321, T. D. 31410;
Myers vs. *United States*, 1 Ct. Cust. Appls., 506, T. D. 31531;
Bayersdorfer vs. *United States*, 7 Ct. Cust. Appls., 66, T. D. 36390; and many others.

(C) By the Circuit Court of Appeals:

United States vs. *Behrend* (CCA, Second Circuit), 167 Fed., 317, T. D. 29499;
Von Bernuth vs. *United States* (CCA, Second Circuit), 146 Fed., 61, T. D. 27028;
United States vs. *Dana* (CCA, Second Circuit), 99 Fed., 433 (1900), affirming 91 Fed., 522;
In re Herter Bros. (CCA, Second Circuit), 53 Fed., 913 (1892);
In re Guggenheim Smelting Co. (CCA, Third Circuit), 112 Fed., 517, 519-521;
Citroen vs. *United States* (CCA, Second Circuit), 166 Fed., 693;
Nersheimer vs. *United States* (CCA, Second Circuit), 136 Fed., 86;
United States vs. *Manassee* (CCA, Seventh Circuit), 56 Fed., 828;
Thomas vs. *Crump* (CCA, Third Circuit), 142 Fed., 734;
United States vs. *Roessler* (CCA, Second Circuit), 137 Fed., 770, T. D. 26127;
United States vs. *Lavino* (CCA, Third Circuit), 175 Fed., 964, T. D. 30168;

Note that in this case United States vs. Lavino et al, the Government's petition for writ of certiorari was denied by this Court; 216 U. S., 618, T. D. 30392;

(D) *By the Circuit Court:*

Proctor vs. *United States* (CC. Dist. of Mass.) 139 Fed., 586, T. D. 26544, affirmed in 145 Fed., 126;
Wakem vs. *United States* (CC. N. Dist. of Ill.) 180 Fed., 1021;
Waddell vs. *United States* (CC. So. Dist. of N. Y.) 124 Fed., 301;
Traitel Bros. vs. *United States* (CC. So. Dist of N. Y.) 131 Fed., 994;
Sheldon vs. *United States* (CC. So. Dist. of N. Y.) 127 Fed., 494;
Ross vs. *Peaslee* (CC. Dist. of Mass.) 2 Curt., 499; 20 Fed. Cas., 1241; Case No. 12077;
United States vs. *Lueders* (CC. So. Dist. of N. Y.) 148 Fed., 398, T. D. 27494.

(E) *By the Board of General Appraisers:*

T. D. 10796, G. A., 349;
T. D. 10919, G. A. 414;
T. D. 10922, G. A. 417.

In re Hahn, T. D. 18872, G. A. 4069, held agate shoe hooks, penholder handles, etc. "dutiable by similitude under said paragraph (480) at 10 per centum ad valorem," paragraph 480 reading: "Precious stones of all kinds, 10 per centum ad valorem"; and that decision was affirmed by the Circuit Court of Appeals, Second Circuit in *Hahn*

vs. *United States*, Suit 2716, 100 Fed., 635, a case which the Assistant Attorney General cites on page 14 of his brief.

T. D. 23748, G. A. 5146;
T. D. 23890, G. A. 5184;
T. D. 23909, G. A. 5188;
T. D. 24053, G. A. 5228;
T. D. 24155, G. A. 5257;
T. D. 24159, G. A. 5261;
T. D. 24206, G. A. 5274, Collector's classification of apricot kernels as almonds by similitude, approved;
T. D. 24410, G. A. 5334;
T. D. 24433, G. A. 5339;
T. D. 25172, G. A. 5633, holding barley brew base dutiable as assessed under the provision for beer by virtue of the similitude clause, citing *Stuart* vs. *Maxwell;*
T. D. 26218, Abstract, 5552;
T. D. 26897, G. A. 6223;
T. D. 28020, Abstract 14743;
T .D. 28217, G. A. 6606, holding real horsehair hats classifiable by similitude as silk wearing apparel, and accordingly affirming the Collector's decision;
T. D. 28759, G. A. 6718;
T. D. 29542, G. A. 6864;
T. D. 31881, G. A. 7275;
T. D. 32617, G. A. 7373.

(There are in the printed reports numerous other decisions of like tenor; but we refrain from citing them in order not to unduly lengthen this brief.)

(F) *By the Treasury Department*:

(F1) *Department decisions under laws prior to Tariff Act of* 1883:

T. D. 276 (Nov. 14, 1868), wherein the Department decided that "wrought-iron fish plates, fish joints or splice bars should be classified by assimilation, by virtue of Section 20, Act of August 30, 1842, as wrought-iron railroad chairs, at 2 cents per pound, under paragraph 14, Section 3, Act of June 30, 1864." Treasury Decisions 523, 585, 691, 928, 2269, 3301, 3844, 3898, 4032, 5354, 5593 and 5743, are all of like tenor.

(F2) *Department decisions under Tariff Act of* 1883:

Treasury decisions 5822, 5903, 5934, 5961, 5969, 5973, 6010, 5642 and 6042, 6071, 6149, 6178, 6179, 5901 and 6268, 6658, 7744, 7860, 7994 and 7924, 8313, 8577, 8746, 8786 and 4143, 8912, 9466, 10211. (All of the foregoing rulings show that during the time the Act of March 3, 1883 was in force, it was the general departmental and administrative practice to interpret the similitude clause as serving to render non-enumerated articles classifiable under the provision for whatever enumerated article they most closely resembled in material, quality, texture or use.)

(F3) *Department decisions under Tariff Acts of* 1890, 1894 *and* 1897:

Treasury decisions 12286, 13409, 13447, 13916, 17602, 19052, 19504, 19816, 21490,

21971, 23788, 23821, 24619, 26275 and 26276, 30321 (all of which indicate how, *in actual administrative practice*, the "similitude" clause as well as the "component material of chief value" and "mixed-material" clauses in Sections 5, 4 and 7 of the Tariff Acts of 1890, 1894 and 1897, respectively, were generally regarded and treated, not as strictly duty levying provisions but rather as furnishing rules to fix the appropriate classification of non-enumerated articles under paragraphs of the dutiable schedule.)

(F4) *Department decisions under Tariff Act of* 1909:

T. D.s 30287, 32010, 32490, 33317, showing that also during this period when the Tariff Law of 1909 was in force, the Department continued to *apply* the similitude clause as a rule of construction in consonance with the decision of this Court in *Stuart* vs. *Maxwell*.

Komada vs. *United States*, 215 U. S., 392, which is liberally cited by Government counsel on pages 23-24 of his brief, really supports the view for which the importer-defendants are here contending, to wit, that the similitude clause *as a general rule, in actual administrative practice* has been *interpreted*, not as a duty levying provision but rather as a clause which served as in the *Komada* case, and as this Court held upon reasoning similar to that employed in *Stuart* vs. *Maxwell*, to make a non-enumerated article, like sake, dutiable at 50 cents per gallon as assessed by similitude to still wine *under paragraph* 296 of the Tariff Act of 1897.

The case of *Wills* vs. *Russell*, 100 U. S., 621, related to merchandise described as "jute rejections," imported in 1872, while the Tariff Acts of March 2, 1861 and July 14, 1862, were in force. The Collector assessed duty at 10 per cent. ad valorem under Section 24 of the Act of 1861, plus $5 per ton under Section 11 of the Act of 1862, and the plaintiffs claimed that the additional $5 per ton duty should not have been charged, and that Section 11 of the 1862 Act did not apply. Said Sections 24 and 11 read respectively:

> "Sec. 24. *And be it further enacted*, That from and after the day and year aforesaid there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem."
>
> "Sec. 11. *And be it further enacted*, That from and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned and provided for in this section, there shall be levied, collected, and paid, on the goods, wares, and merchandise herein enumerated, imported from foreign countries, the following duties and rates of duty, that is to say:
>
> On jute, Sisal grass, sun hemp, coir, and other vegetable substances not enumerated, (except flax, tow of flax, Russian and manilla hemp, and codilla, or tow of hemp), five dollars per ton."

Upon trial it was shown or conceded that jute rejections were not enumerated or directly provided for in said Section 11, and the trial court over the importers' objection admitted evidence which tended to show that jute rejections were *similar* to jute or the articles named in Section 11 and therefore correctly assessed with the additional duty of $5 per ton. The importers (or plaintiffs) excepted to the ruling of the Circuit Court admitting such evidence and brought the case to the Supreme Court by writ of error. Mr. Justice Clifford, delivering the opinion of the Court, said:

> "Their fourth prayer was also rejected; but the court instructed the jury in its stead that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in Section 11 of the act under which the same were imported, adding, that if they were, then the duty was properly assessed; that if they were not, then their verdict should be for the plaintiffs.
>
> New products or articles of importation frequently appear, and hence it is that Congress finds it necessary to impose duties by some general designation, in order that non-enumerated articles may not escape from their just share of the public burden. * * *
>
> And the court here fully concurs in the view of the Circuit Court, that the duties were properly assessed if the products imported were of a class of non-enumerated vegetable substances similar to the enumerated articles mentioned in the clause of Section 11, which imposes the duty in question" 100 U. S., pages 628, 629.

In the Wills case the Court did not in terms refer to the similitude clause, but it seems plain that that was what they had in mind as the appropriate provision which served to make the goods dutiable by similitude at $5 per ton under Section 11 as assessed; and it may be observed that the Court evidently took the view that the similitude, chief value, and mixed material provisions of Section 20 of the old Act of August 30, 1843, were to be read into the Act of 1862, the same as Mr. Justice Curtis held in *Stuart* vs. *Maxwell*, 16 How., 150, 160, 162, that they were to be read into the Tariff Act of July 30, 1846.

In *United States* vs. *Downing*, 201 U. S., 354, T. D. 27281, this Court specifically sustained the decision of the Board of General Appraisers, T. D. 23353, G. A. 5020, which held certain round sticks of carbon "dutiable under paragraph 98 of said Act (i. e., the Act of July 24, 1897), by virtue of the similitude clause, as carbons for electric lighting, at the rate of 90 cents per hundred."

In *Strauss* vs. *United States*, 2 Ct. Cust. Appls., 203, T. D. 31946, Judge Smith, speaking for the Court, after discussing the general purpose and effect of the similitude clause, concluded that certain combs made of gallalith were dutiable by virtue of said clause under paragraph 463 of the Tariff Act of 1909 as combs made of horn, thereby sustaining the Government's contention.

Strohmeyer vs. *United States*, 3 Ct. Cust. Appls., 399, T. D. 32987, involved certain blood pudding, which *had been classified* by similitude as prepared meats under paragraphs 275 and 286 of the Tariff Acts of 1897 and 1909 respectively, following a procedure which had been approved by various decisions of the Board; and Judge Martin, delivering the opinion of the Court, held in accordance with

the contention then made by the Assistant Attorney General that such classification perforce of the similitude clause was correct.

Robins vs. *United States*, 1 Ct. Cust. Appls., 252, T. D. 31278, upheld the *Government's* contention that balata belting was dutiable under paragraph 419 as manufactures of India rubber by similitude.

In *Gross* vs. *United States*, 1 Ct. Cust. Appls., 321, at page 323, Presiding Judge Montgomery said:

> "By similitude, it (the merchandise in suit) should be assessed under paragraph 126."

Meyers vs. United States, 1 Ct. Cust. Appls. 506, 510 (T. D. 31531), opinion by Montgomery, P. J., sustained the Government's contention that the substance there in controversy, a product of corundum, was dutiable as assessed under the provision for emery in the dutiable schedule by virtue of the similitude clause.

In *Bayersdorfer* vs. *United States*, 7 Ct. Cust. Appls., 66, opinion by Judge Barber, the Court held that "dyed immortelles are properly classifiable by similitude as preserved cut flowers under the paragraph" (210). 7 Ct. Cust. Appls., page 74.

In the present suit the importance if not the controlling force of repeated judicial construction by this Court of the similitude clause as a rule of denomination, also of the legislative re-enactment of the old Section 20 of the Act of 1842 as construed, and the very long-continued administrative custom of so treating the similitude clause in actual practice were recognized in the prevailing opinion of the Court of Customs Appeals, and in the dissent-

ing opinion before the Board. See Record, pages 16 to 19, and 23 to 26.

From the foregoing decisions of the Treasury Department, Board of General Appraisers and Courts interpreting the similitude clause as a rule of construction rather than a specific duty levying provision, considering also the fact that this clause and its associate provisions known as the "component material of chief value" and "mixed-material" clauses, have been repeatedly re-enacted by Congress in substantially the same language in numerous tariff acts since the decision in *Stuart* vs. *Maxwell*, including the Tariff Acts of 1883, 1890, 1894, 1897, 1909 and 1913, and bearing in mind also that according to the actual practice of Collectors of Customs throughout the United States, for a period of more than half a century the similitude clause has been treated as a statutory provision which served to make non-enumerated articles dutiable under the tariff provision for the article which they most nearly resembled in material, quality, texture and use, we respectfully submit that seldom, if ever, could a stronger case be presented to call for the application of the rules of "long continued practice," or "executive construction" and of "judicial interpretation of a statute followed by its legislative re-enactment."

The following language employed by Mr. Justice Clarke in his opinion in *National Lead Co.* vs. *United States*, 252 U. S., 140, 146, concerning drawbacks, is also applicable to Section 20 of the Act of 1842 and its re-enactments and executive practice thereunder:

> "The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be

paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute, *United States* vs. *Philbrick, supra*; *United States* vs. *G. Falk & Brother*, 204 U. S., 143, 152; *United States* vs. *Cerecedo Hermanos y Compania*, 209 U. S., 337; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States* vs. *Bailey*, 9 Pet., 238, 256."

252 U. S., pages 146-147.

Judge Smith, delivering the opinion of the Court of Customs Appeals in *Strauss* vs. *United States*, 2 Ct. Cust. Appls., 203, similarly stated the rule as follows:

> "A legislative adoption or approval of the interpretation given to any provision of a tariff act by the department of the Government charged with its execution or by the tribunals required by law to determine its meaning may be presumed when the legislation has been subsequently re-enacted by Congress without change or modification affecting the provision interpreted. When, however, the legislation has been subsequently modified in any substantial particular relating to the provision interpreted, no such presumption arises. *United States* vs. *Cerecedo Hermanos y Compania* (209 U. S., 337-339); *United States* vs. *Falk & Bro.* (204 U. S., 143-152); *Komada & Co.* vs. *United States* (215 U. S., 392-397)."

And in *United States* vs. *Borgfeldt*, 7 Ct. Cust. Appls., 367, T. D. 36909, Judge De Vries, speaking for the Customs Court of Appeals, said:

"It was declared by this court in an early decision, *Goussios & Co., et al.* vs. *United States* (2 Ct. Cust. Appls., 317; T. D., 32051), that the rule of administrative construction is a *master rule*. That rule has been so often reaffirmed and applied by this and the Supreme Court that its determinative force, where applicable, can not be questioned. See *Shallus* vs. *United States* (1 Ct. Cust. Appls., 556; T. D., 31552); *United States* vs. *Myers* (1 Ct. Cust. Appls., 257; T. D., 31301); *Salomon* vs. *United States* (2 Ct. Cust. Appls., 92; T. D., 31635); *Bloomingdale Bros.* vs. *United States* (3 Ct. Cust. Appls., 204; T. D., 32530); *United States* vs. *Post & Co.* (3 Ct. Cust. Appls., 260; T. D., 32568); *Psaki Bros* vs. *United States* (3 Ct. Cust. Appls., 479; T. D., 33122); *Kronfeld, Saunders & Co., et al.* vs. *United States* (5 Ct. Cust. Appls., 222; T. D., 34399); *Ulmann & Co.* vs. *United States* (5 Ct. Cust. Appls., 357; T. D., 34551); *United States* vs. *Steeb & Co.* (6 Ct. Cust. Appls., 275; T. D., 35503); *Edwards's Lessee* vs. *Darby* (25 U. S., 206); *Pennoyer* vs. *McConnaughy* (140 U. S., 1); *Copper Queen Mining Co.* vs. *Arizona Board* (206 U. S., 474); *United States* vs. *Midwest Oil Co.* (236 U. S., 459)."

7 Ct. Cust. Appls. pages 370-371.

The reasons for applying the rule as above quoted in the case at bar are strengthened and reinforced also by the *judicial construction* of this court placed upon Section 20 of the Act of 1842 and its successor paragraphs in all of the cases hereinbefore cited on page 12 of this brief.

III.

The current of judicial decisions has generally favored most liberal rather than a strict interpretation of protests as pleadings, and supports the view that technical precision, nicety of pleading, or exactitude of language is not essential to their validity, because in one sense at least protests are in the nature of commercial documents.

Upon this question of liberal rather than strict construction of the statute relating to pleadings and to protests in particular, Judge Martin says in his opinion:

> "It is manifest that in the ordinary course of trade such instruments are often likely to be filed by laymen without technical education in the law, and under circumstances which make it difficult, if not impossible, to secure the aid of counsel. It is reasonable to assume that this fact was within legislative view, and therefore to conclude that a protest should be tested by the rules relating to commercial instruments rather than by the strict rules of legal pleadings. It may be noted also in this behalf that no provision in practice is made for a demurrer or motion addressed to the form or sufficiency of a protest, nor for an answer or plea thereto, nor for an amendment thereof. Consequently, when the act requires that a protestant shall set forth in his protest 'distinctly and specifically the reasons for his objections' to an assessment, it requires only such

a measure of distinctness and particularity as is fairly and reasonably necessary to inform the collector concerning the nature and extent of the protestant's claim. And in applying this rule it should be remembered that the collector is charged with a knowledge of the law, in the present instance with a knowledge of the similitude provisions and their coordination with each of the enumerating paragraphs of the act. When the collector and his advisory assistants first pass upon an importation they must necessarily consider the similitude provisions as well as the enumerating paragraphs of the act in order to classify the merchandise for duty. Conversely, the importers also are legally charged with a knowledge of the similitude provisions of the act, and accordingly the collector is under no duty to mention these when they form the basis in part of the assessment."

Record, page 23.

And upon this point General Appraiser Brown said in his dissenting opinion:

> "The tendency of all modern judicial decisions, Federal and State, has been to liberally construe statutes relating to 'pleading and practice' so as to avoid, if possible, all technical miscarriage of justice. * * *
>
> The very fact that, unlike all other modern pleadings, customs protests can not be amended, should lend every legal intendment in favor of a liberal construction for every protest which claims the right paragraph upon whatever theory of law or fact the goods are properly classified thereunder.

This remedy is a national one and was intended as much for the protection of the casual importer in the small port remote from ordinary business activity as for the well-advised large merchant in the great market places.

The national scope of this procedure and its general purposes must be taken into account whenever a congressional intent is contended for which increases in any way the technical requirements for bringing this form of action against the Government of the United States.

If a liberal construction must be given to the pleadings in actions between individuals in applying the remedies of the 'private law,' such liberal construction is even more imperatively required in legal actions by the citizens against their Government now known as the 'administrative' or 'public law.'"

Record, pages 16, 19.

The following decisions tend to sustain the views above quoted:

T. D., 8218;
T. D., 37972, G. A., 8248;
Greeleys Administrators vs. *Burgess*, 18 How., 413, 416-417;
Schell's Executors vs. *Fauche*, 138 U. S., 567, approving;
Burgess vs. *Converse*, 2 Curt., 216; Fed. Cas., No. 2154;
United States vs. *Salambier*, 170 U. S., 621;
Swanson vs. *Morton*, 1 Curtis, 294; 23 Fed. Cas., 516;
Heinz vs. *Arthurs Executors*, 144 U. S., 28;

United States vs. *Shea* (CCA) 114 Fed. Rep., 38;
Shaw vs. *United States* (CCA) 122 Fed. Rep., 443;
Lothrop vs. *United States* (CC) 164 Fed. Rep., 99;
United States vs. 112 *Casks of sugar*, 8 Peters, 277.

In T. D. 8218, the Assistant Secretary of the Treasury said:

> "The authorities upon the subject all hold that these protests are commercial documents, made 'amid the hurried activity of trade,' and it is not intended that they should possess all the technical precision of legal documents. They have always been liberally construed by the courts and great formality or fullness is not to be expected, and should not be required."

And other liberal views on "sufficiency of protests" have recently been expressed by the Board in T. D. 37972, G. A. 8248.

The same general principle was applied in *United States* vs. *Salambier*, 170 U. S., 621, the Supreme Court there holding that a certain protest was sufficient which omitted to name any paragraph, but merely set forth "that the said goods under existing laws are dutiable at 2 cents per pound, and the exaction of a higher rate is illegal and unjust."

In *Greeley's Administrators* vs. *Burgess*, 18 Howard, 413, 416-417, the Court said:

> "This statute (i. e., the one corresponding to subsection N of Section III of the Tariff

> Act of 1913) was designed for practical use by men engaged in active commercial pursuits, and was intended to superinduce a prompt and amicable settlement of difference between the Government and the importer. The officers of the Government on the one part, and the importer or his agent on the other, are brought into communication and intercourse by the act of entry of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute."

That decision affirmed the ruling of Judge Curtis in *Burgess* vs. *Converse*, 2 Curt., 216; Fed. Cas. No. 2154, wherein he said: "These protests are commercial documents, occurring in the course of trade, and under circumstances when technical precision, or fullness, cannot be expected and ought not to be required." Subsequently it was approved in 1891 in *Schell's Executors* vs. *Fauche*, 138 U. S., 567.

In *Swanston* vs. *Morton*, 1 Curtis, 294; 23 Fed. Cas. page 516, the protest was as follows:

> "We hereby protest against paying the additional penalty of twenty per cent. believing the entry and invoice presented by us to be the actual cost of the barilla."

The only objection made to the protest was that it protested against the payment of a penalty, whereas, the amount paid was not a penalty but an additional duty, and so denominated in the

Tariff Act. Mr. Justice Curtis, sitting at Circuit, said:

> "These protests are commercial documents, and though they must be certain and distinct, they need not conform to any technical rule. If this protest, taken in connection with the other contents of the paper on which it is written (it appeared that the protest was written on the entry), and to which it refers, makes known what was protested against, it satisfies the statute in this particular. That it does make this known, no reasonable man can doubt."

In *Heinze* vs. *Arthur's Executors*, 144 U. S., 28, a protest was filed in 1874, against the assessment of duty on certain gloves assessed at 60 per centum ad valorem, and the claim was made that they were "only liable to a duty of 35 per cent. less 10 per cent., being composed of cotton and silk, cotton chief part, the duty of 60 per cent. being only legal where silk is the chief part." The rate mentioned in the protest was found to be the correct rate, but this could only be ascertained by reference to Section 22 of the Act of March 2nd, 1861, Section 13 of the Act of July 14th, 1862, Section 6 of the Act of June 30th, 1864, and Section 2 of the Act of June 6th, 1872.

Section 22 of the Act of March 2d, 1861 (12 Stat., 191) provided for several hundred articles, the relevant portions being as follows:

> "Sec. 22. And be it further enacted. That from and after the day and year aforesaid, there shall be levied, collected, and paid a duty

of thirty per centum on the importations of the articles hereinafter mentioned and embraced in this section, that is to say:

* * * * * * *

Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women or children, and not otherwise provided for;

* * * * * * *

Clothing, ready-made, and wearing apparel of every description, of whatever material composed, except wool, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer;"

Section 13 of the Act of July 14th, 1862 (12 Stat., 555-6), likewise provided for several hundred articles, and the relevant portions were as follows:

"Sec. 13. And be it further enacted, that from and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid, on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, a duty of five per centum ad valorem, that is to say:

* * *

Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for;

* * * * * * *

Clothing, ready-made, and wearing apparel of whatever description, of whatever material composed, except wool, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer;

* * * * * * *

Manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, or worsted, hemp, jute or flax;"

Section 6 of the Act of June 30th, 1864 (13 Stat., 208-9), was another comprehensive provision covering a great number of articles. Subdivision 4 of Section 6 was as follows:

"Fourth. On spool-thread of cotton, six cents per dozen spools, containing on each spool not exceeding one hundred yards of thread, and in addition thereto thirty per centum ad valorem; exceeding one hundred yards, for every additional hundred years of thread on each spool, of fractional part thereof in excess of one hundred yards, six cents per dozen, and thirty per centum ad valorem.

On cotton shirts and drawers, woven or made on frames, and on all cotton hosiery, thirty-five per centum ad valorem.

On cotton velvet, thirty-five per centum ad valorem.

On cotton braids, insertings, lace, trimmings, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum ad valorem."

Section 2 of the Act of June 6th, 1872 (17 Stat., 231), was another long section containing among other provisions, the following:

"Sec. 2. That on and after the first day of August, eighteen hundred and seventy-two, in lieu of the duties imposed by law on articles in this section enumerated, there shall be levied, collected and paid on the goods, wares, and merchandise in this section enumerated and provided for, imported from foreign countries, ninety per centum of the several duties and rates of duty now imposed by law upon said articles severally, it being the intent of this section to reduce existing duties on said articles ten per centum of such duties, that is to say:

On all manufactures of cotton of which cotton is the component part of chief value."

No one of these provisions or acts was set forth or even mentioned in the protest. The Supreme Court, nevertheless, held the protest was sufficient, and that it was entirely immaterial that the protest did not specify that the gloves were made on frames. 144 U. S., 28.

In the case of *United States* vs. *Shea*, 114 Fed. Rep., 38, the Circuit Court of Appeals for the Seventh Circuit went so far as to hold that a protest claiming "that the goods in question are specifically provided for and dutiable under Paragraph 425 (of the Tariff Act of October 1, 1890) as 'manufactures of paper' dutiable at twenty-five per cent. ad valorem," was sufficient to warrant classification at the 25% ad valorem rate under Paragraph 422 of that Act, covering "paper not specially provided for." It is manifest that a decision in the importer's favor in the case at bar does not necessitate any such liberal construction of Subsection N Section III of the Tariff Act of

1913 as the Circuit Court of Appeals for the Eighth Circuit saw fit to grant.

In *Shaw* vs. *United States* (C. C. A.) 122 Fed. Rep., 443, the importer claimed under Paragraph 646 of the Tariff Act of 1894, whereas he ought to have claimed under Paragraph 677 of the Tariff Act of 1897, yet the Circuit Court of Appeals held that the protest was sufficient, saying:

> "The Act of 1894 had been superseded and repealed and the Collector must have known that the reference to it, by the importer, was a mistake. * * * If the importer had said, 'I claim that the said goods are free as tapioca,' it would have been sufficient under the rule laid down in *United States* vs. *Salambier*, 170 U. S., 621; 18 Sup. Ct., 771; 42 L. Ed., 1167. It is true that, in the present case, this was not done in terms, but the necessary consequence of the notice, was to inform the Collector of the precise character of the importer's claim."

See, also

> *Lothrop* vs. *United States* (CC) 164 Fed. Rep., 99.

Similar broad, liberal views concerning protest pleadings, and the manner in which they are to be interpreted, have been expressed by all of the members of the Court of Customs Appeals in the following decisions:

> *Carter* vs. *United States*, 1 Ct. Cust. Appls., 64; T. D. 31033 (opinion by Judge Montgomery);

Bing & Co.'s Successors vs. *United States*, 3 Ct. Cust. Appls., 211; T. D. 32532 (opinion by Judge Smith);

Dickerhoff, Raffloer & Co. vs. *United States*, 4 Ct. Cust. Appls., 230; T. D. 33440 (opinion by Judge De Vries);

United States vs. *Stirn*, 5 Ct. Cust. Appls., 140; T. D. 34191 (opinion by Judge Barber);

Deuike vs. *United States*, 5 Ct. Cust. Appls., 364; T. D. 34553 (opinion by Judge Smith);

United States vs. *Straus*, 5 Ct. Cust. Appls., 147, 149; T. D. 34193 (opinion by Judge Smith);

Michelin Tire Co. vs. *United States*, 6 Ct. Cust. Appls., 283, T. D. 35507 (opinion by Judge Montgomery);

United States vs. *Tappenbeck*, 7 Ct. Cust. Appls., 17; T. D. 36258 (opinion by Judge Barber);

United States vs. *Murphy & Co.*, 7 Ct. Cust. Appls., 35; T. D. 36261 (opinion by Judge Martin);

General Electric Co. vs. *United States*, 7 Ct. Cust. Appls., 157; T. D. 36464 (opinion by Judge De Vries);

United States vs. *Harlan & Hollingsworth Corporation*, 8 Ct. Cust. Appls., 236; T. D. 37497 (opinion by Judge De Vries);

United States vs. *Snellenburg & Co.*, 9 Ct. Cust. Appls., 59; T. D. 37939 (opinion by Judge Montgomery).

If the fundamental underlying principles enunciated in all of the foregoing decisions be applied in the instant case, and if the protests are consid-

ered as commercial or quasi-commercial documents, designed to afford relief to the protestants from taxes that may be unjust or excessive, it seems clear that these protests are not open to the charge of being either insufficient, indistinct, or not specific.

IV.

The decision of this court in United States vs. Guggenheim, 186 U. S., 485, denying the Government's application for writ of certiorari is stare decisis of this issue.

Practically the same question as the one involved in the present case concerning the similitude clause was presented before this Court and considered in the Guggenheim case. The issue therein raised by the pleadings was whether certain base bullion in bars containing gold, silver, lead and other metals should be classified for duty purposes as assessed by the Collector under paragraph 166 of the Tariff Act of 1894, which provided for "lead in pigs and bars, molten and old refuse lead run into blocks and bars, and old scrap lead fit only to be remanufactured," or as claimed by the importers under paragraph 165 of that Act providing for "lead ore and lead dross * * *silver ores and all other ores containing lead"; and the Circuit Court of Appeals for the Third Circuit held (opinion by Judge Gray, 112, Fed. 517), that by similitude, although the similitude clause was not claimed in the protest, the base bullion in question should be classified under paragraph 165, it being similar in material to the ores containing lead provided for in that paragraph. The Court said:

"There is great difficulty, also, in applying the language of paragraph 165, above quoted, to this importation. It certainly is not lead ore or lead dross, nor does it seem completely to fill the description of silver ore or other ores containing lead, as the word 'ore,' in its ordinary signification, is not applicable thereto. That term is used to denote a native product of the mines, containing metal combined with more or less of the impurities that are always found in combination with it mechanically or chemically, and before it has been subjected to any smelting or separating process whatever. The subject of this importation, as we have seen, was the result of a crude and primary smelting process, the result of which was not strictly an ore, and certainly was not a pure lead fit for use and manufacture in the arts.

Inasmuch as there cannot be, and should not be, a tax of doubtful authorization, it has been repeatedly declared by the Supreme Court that, where the question of the imposition of the tax is one of doubt, the doubt must be resolved in favor of the importers, and that 'duties are never imposed on the citizen upon vague or doubtful interpretations.' In view of this well settled principle, it would not be difficult in this case to arrive at the conclusion that, since the importation in question is not described in any of the schedules of the tariff act imposing a duty, it should be free of duty altogether. The specific enumeration, however, of all articles intended to be free of duty, and the provision made by Sections 4 and 21 of the act, as well as the fact that the protest of

the importer points out paragraph 165 as that under which duty should be paid, brings us to the conclusion that a duty on the importation in question should be imposed under paragraph 165.

Section 4 of the act, which we think is applicable in this case, is as follows:

(Section 4 is then quoted)

Section 21 of the same act provides as follows:

(Section 21 is then quoted)

The intention of Congress, therefore, as evidenced by the general scheme of the tariff act, being that no article not specially enumerated in the free list should be admitted into the country free of duty, we feel compelled to apply the so-called 'similar' provisions of Section 4 to the importation here in question.

The designation, in Section 21, of 'ores or metals in any crude form requiring smelting or refining to make them readily available in the arts,' we think clearly includes the importation here in question. Though it is used in said section in connection with provisions authorizing the establishment of private smelting works, as bonded warehouses, in which such crude metals or ores may be smelted, and the refined metal obtained therefrom under proper supervision for the payment of duty thereon, and not as per se describing a dutiable article, yet it makes effective the provisions of Section 4, taken in connection therewith, and renders it more readily applicable to the case in hand. We think, therefore, that the importation was a crude metal or ore 'similar' in material to the silver ore and other

ores containing lead described in paragraph 165. The duty on refined lead extracted therefrom can be easily ascertained under the provisions of Section 21 and the treasury regulations authorized by and issued in pursuance thereof . * * *

In the case we are now considering, however, the protest of the importer denies that the importation was dutiable under paragraph 166, but asserts that it is dutiable under paragraph 165. We think, therefore, that the appraisers and the Court below, who affirmed their decision, erred in not imposing the tax of three-quarters of a cent per pound, provided for in paragraph 165, instead of the duty of one cent per pound, which was imposed upon the gross weight of the base bullion.

The order and decree of the Court below, affirming the decision of the general appraisers in this case, is reversed, with directions to enter a decree *classifying the importation here in question under paragraph* 165 *of Schedule C of the tariff act of August* 27, 1894." (Italics ours.)

112 Fed., pages 519-521.

Subsequently the Government applied to this Court for a writ of certiorari in that case, and it was urged in effect by the Attorney General in his brief in support of the petition, as reason why the writ should be granted, that the decision of the Circuit Court of Appeals for the Third Circuit (112 Fed., 517, 50 C. C. A., 374), was erroneous in holding, contrary to the ruling of the Circuit Court of Appeals for the Second Circuit in the

Hahn case, that the similitude clause might be applied as a rule of construction without being specially pleaded.

In opposition, counsel for the respondents argued that the decision of Judge Gray for the Circuit Court of Appeals, Third Circuit, on this point, was fully justified, and that the principle announced in the Hahn case was erroneous. Upon that state of facts the Government's application for a writ of certiorari was denied. 186 U. S., 485.

Thereafter, in the Balbach and Feuchtwanger cases, T. D. 23852, G. A. 5171, and T. D. 23909, G. A. 5188, wherein the opinions were written by General Appraisers Somerville and Fischer respectively, the following view was taken of the denial by this Court of the Government's application for a writ of certiorari in the Guggenheim case:

> "The denial of this application by the court, cannot, in our judgment, be construed in any other light than as disapproving the doctrine announced in the Hahn case, and supports the view necessarily held in the Guggenheim case, that in order to sustain the classification of merchandise under any paragraph of the tariff act on the principle of similitude within the meaning of said section 4, or of other analogous provisions of later acts, it is *not* essential that the importer should specially invoke in his protest the benefit of the provisions of this section.
>
> We hold, therefore, that the protests now under consideration, although they fail to invoke the provisions of the similitude clause, are sufficiently specific; also, that the merchandise is dutiable under paragraph 165, tariff act of

1894, at the rate of three-fourths of 1 cent per pound on the lead contained therein, according to sample and assay, as assimilating in material to the silver ore and other ores containing lead which are provided for in that paragraph."

T. D. 23852.

Before reaching that conclusion, Judge Somerville discussed at some length the facts of the Guggenheim case, and the arguments as made by both sides in connection with the application for the writ of certiorari.

Thereafter, in the second Dearberg case, T. D. 27252, G. A. 6327, General Appraisers Howell and Fischer felt constrained to follow the opinion of the Circuit Court of Appeals, Second Circuit, in the Hahn case; but Judge De Vries, in his dissenting opinion reached the same conclusion that Judge Somerville did in the Balbach case about the superior controlling force of this Court's denial of application for writ in the Guggenheim case.

De Vries, J., said:

"Inasmuch as this decision follows the conclusions reached in the case of *Hahn* vs. *Erhardt* (78 Fed. Rep., 622), and subsequent adjudications thereof by the United States Circuit Court of Appeals for the Second Circuit, I feel constrained to dissent therefrom, for the reasons expressed in the opinion of my colleagues. Inasmuch as the Guggenheim case (112 Fed. Rep., 517), decided by the Circuit Court of Appeals for the Third Circuit, has received the approval of the United States Supreme

Court, in that a writ of certiorari in that case was denied, it seems to me that *that is the higher authority*. Moreover, if the decision of the highest court is not to be followed by this Board, as stated, it would result in one construction being placed upon the cases arising in the second circuit and another construction being placed upon the cases arising in the third circuit."

T. D. 27252.

Upon this point General Appraiser Brown in his opinion, in the present case, which was upheld by the Court of Customs Appeals, said:

"I am unable to concur in the view than when a protestant has claimed the correct paragraph under which his goods should have been assessed (here paragraph 210) and has fully proved his case, that the Congress intended he should, nevertheless, be defaulted upon the technical and artificial ground that he should also have cited the paragraph number of the similitude clause which applies to all the dutiable sections of the act.

When he claims the correct paragraph, that is and ought to be sufficient whether his proof shows that his goods come thereunder by the common meaning of the words of the statute, by their commercial meaning, by chief value, by similitude, or any other rule of fact or law which will so classify them.

The rule set out by the majority opinion works a manifest injustice which there is no language to justify in the statute governing this liberal procedure. It, on the contrary,

was established to give an easy judicial remedy for the return of money illegally taken and to prevent injustice in the collection of customs taxes.

So believing, I emphatically dissent.

This was the view expressed by Judge Somerville in Balbach's case, G. A. 5171 (5 Treas. Dec., 557), by Judge Gray, of Delaware, in the Guggenheim case (112 Fed., 517), and by Judge De Vries in the last Dearberg case, decided March 29, 1906, G. A. 6327 (11 Treas. Dec., 493).

The case of *Herrman* vs. *Robertson* (152 U. S., 521) has no application. There the protest read:

> 'We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per cent. ad valorem as a non-enumerated article under the second half of Section 2499, Rev. Stat., being the highest rate of duty which any of the component material pays.'

The schedule under which the goods were held to be properly dutiable (Schedule M. Section 2504, R. S.) as 'all other manufacturers of hair, not otherwise provided' was not mentioned in the protest which was consequently held to be insufficient."

(Record, page 15.)

Another final decision on a very similar issue which the Court of Customs Appeals arrived at by independent reasoning is *United States* vs. *Snellenburg*, 9 Ct. Cust. Appls., 59, T. D. 37939. The opinion in that case was delivered by Presiding Judge Montgomery.

Government Counsel on pages 36 to 39 of his brief has attempted to distinguish the Snellenburg case, but the distinction which he seeks to draw is a very fine one; and the *essential* parallel of the issues in the two cases, as well as the similarity in general language between paragraphs 303 and 386, is shown by what Judge Martin says in his opinion in the case at bar quoting from the opinion of Judge Montgomery in the Snellenburg case (See Record, pages 26-27).

We respectfully submit that the views expressed by Judge Montgomery in the Snellenburg case, by Judge Martin and by General Appraiser Brown in the case at bar, and by Judge Gray in the Guggenheim case, are all more nearly in accord with the SPIRIT OF THIS GOVERNMENT than are the technical views of the Circuit Court of Appeals, Second Circuit, to the contrary.

V.

In *practically every* decision which a collector makes concerning the classification of imported merchandise he is compelled to consider and to determine for himself on whatever evidence he may have at hand whether the merchandise is dutiable under a given statutory provision either directly, by virtue of the common and ordinary understanding of the terms employed, or by commercial designation, or by virtue of long continued practice, or by virtue of the similitude clause, or by reason of its being made in chief value of the material therein named. It is clear, therefore, that no such additional "tremendous burdens" or "endless undertaking" will be imposed upon collectors as our learned opponent anticipates and refers to on pages

17 and 21 of his brief, if the decision of the Court of Customs Appeals in the present case is upheld.

Further, it may be borne in mind that the importer's protest, which is his sole and only pleading in customs law suits like this against the Government, cannot be changed or amended; although in practically all other suits in municipal, state and federal courts, pleadings can be amended. *In re Sherman*, 49 Fed., 224; T. D. 23630, G. A. 5108.

VI.

Various additional and most persuasive reasons why judgment should be rendered in the importers' favor have been stated so ably and and so logically by Judge Martin in his prevailing opinion for the Court of Customs Appeals (Record, pages 22-27), and also by General Appraiser Brown in his dissenting opinion before the Board (Record, pages 15-20 inclusive), that we respectfully refer to these, and, to avoid repetition, ask the Court to consider them as a part of our brief.

It is submitted that the decision of the Court of Customs Appeals herein (Record, pages 22 to 27), which sustained the dissenting opinion filed before the Board (Record, pages 15 to 20), was *right*, legally sound and fully in accord with the rulings of this Court as expressed in *Stuart* vs. *Maxwell*, 16 How., 150, and other cases discussed in Points II and III of this brief concerning interpretation

and view to be taken of protests as pleadings in customs law suits, and the fundamental purpose, scope, force and effect of the "similitude clause." It is also urged that the view expressed by Judge De Vries in the Dearberg case, as quoted on pages 52-53 of this brief was correct. Accordingly the importers respectfully ask that their protests be held to be sufficient; that their claim for the 25 per cent. rate under Paragraph 210 may be held to be valid in law as well as in equity; and that the decision of the Court of Customs Appeals be affirmed.

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